No. 2765

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United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN NATIONAL BANK, a Corporation,
Plaintiff in Error,

vs.

BANK OF BANDON, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the United States District Court, in and for the Northern District of California, Second Division.

(No. 15,831.)

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,

Defendant.

Complaint.

Plaintiff complains and alleges:

I.

That plaintiff is now and at all of the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Oregon, and having its principal place of business in the city of Bandon in said State of Oregon; that said plaintiff is now and at all of the times herein mentioned was a citizen and resident of said State of Oregon, and at all of the times herein mentioned did, and still does, conduct, and transact a business of general banking in said city of Bandon, State of Oregon.

II.

That defendant is now and at all of the times herein mentioned was a national banking corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the city and county of San Francisco, State of California. That the

place where the operations of discount and deposit are carried on by defendant is now, and at all of the times herein mentioned, was the said city and county of San Francisco, in the State of California. That the said defendant is now [1*] and at all times herein mentioned was a citizen and resident of the said Northern District of the State of California.

III.

This controversy is wholly between citizens and residents of different States, to wit, a controversy between the plaintiff, a citizen and resident of the State of Oregon, and the defendant, a citizen and resident of the State of California.

IV.

That the controversy herein involves, exclusive of interest, a sum in excess of the sum of Three Thousand Dollars ($3,000), to wit, the sum of Six Thousand Dollars ($6,000).

V.

That for more than one year prior to the 15th day of December, 1913, the defendant herein had been and was the San Francisco correspondent of the plaintiff herein, and that for more than one year prior to the said 15th day of December, 1913, Alfred Johnson Lumber Company, a corporation, was a client and customer of said plaintiff herein. That said Alfred Johnson Lumber Company, a corporation, was on the 15th day of December, 1913, and for more than one year prior thereto had been engaged in the business of cutting lumber in and near the said town of Bandon, State of Oregon, and shipping the

*Page-number appearing at foot of page of original certified Record.

same by sea to said city and county of San Francisco, State of California, and elsewhere; and that on divers occasions prior to said 15th day of December, 1914, the said Alfred Johnson Lumber Company, a corporation, had drawn its draft in favor of said plaintiff herein on the Robert Dollar Company, a corporation, having its principal place of [2] business in the city and county of San Francisco, State of California, against cargoes of lumber shipped from said city of Bandon to the said city and county of San Francisco; that on divers occasions the said plaintiff herein had forwarded said drafts to the said defendant herein for collection and upon receipt from said defendant of the acceptance of said drafts, said plaintiff had on divers occasions paid out the money thereon to the said Alfred Johnson Lumber Company, a corporation.

VI.

That heretofore, and on the said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, made and issued its certain draft in words and figures following, to wit:

"$6,000.00 Bandon, Ore., Dec. 15, 1913.

At sixty days sight pay to the order of Bank of Bandon, Bandon, Ore. Six Thousand and no/100 Dollars value received and charge the same to the account of Alfred Johnson Lumber Co.

S. P. BARTLETT,
Treas.

To the Robert Dollar Co.
160 California St.,
No. 17. San Francisco, Cal."

VII.

That on said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, delivered said draft to the plaintiff herein and that then and thereupon, and on said 13th day of December, 1913, the said plaintiff herein endorsed on the back of said draft the following: [3]

> "Pay to the order of American National Bank, San Francisco, Cal. All prior endorsements guaranteed. Bank of Bandon, Bandon, Ore.
>
> F. J. FAHY,
> Cashier."

and that then and thereupon and on said 15th day of December, 1913, in accordance with the custom established between plaintiff and defendant herein, as aforesaid, forwarded the said draft to the said defendant herein.

VIII.

That thereafter and on the 19th day of December, 1913, the said defendant herein notified and advised the plaintiff that the said draft had been accepted by the said drawee Robert Dollar Company, a corporation.

IX.

That in truth and in fact, the said draft had not been accepted but that on said 19th day of December, 1913, the said draft was refused acceptance by the said Robert Dollar Company, a corporation; but that the said defendant did not notify said plaintiff that said draft had been refused acceptance until the 29th day of December, 1913.

X.

That said Alfred Johnson Lumber Company, a corporation, conducts a certain lumber mill near said town of Bandon, State of Oregon. That between said 19th day of December, 1913, and said 29th day of December, 1913, the said plaintiff herein advanced to said Alfred Johnson Lumber Company, a corporation the sum of Four Thousand Five Hundred Dollars ($4,500) upon the said draft, which said sum of Four Thousand Five Hundred Dollars ($4,500) was used by said Alfred Johnson Lumber Company, a corporation, for its payroll at said lumber mill, and that the labor for which said Four Thousand Five Hundred [4] Dollars ($4,500) was expended, by the said Alfred Johnson Lumber Company, a corporation, was used to produce a certain cargo of white cedar, and that prior to the said 29th day of December, 1913, and subsequent to the 19th day of December, 1913, and the receipt of notice and advice hereinbefore set forth at paragraph VIII herein, the said cargo of white cedar was worth the sum of Twelve Thousand Dollars ($12,000) and was shipped in said town of Bandon by the steamer "Grace Dollar" to said city and county of San Francisco, and that if said plaintiff had known that said draft had not been accepted, said plaintiff could and would have commenced suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of Four Thousand Five Hundred Dollars ($4,500), and could and would have attached said cargo of white cedar, and that by reason of the notice and advice hereinbefore set forth in paragraph VIII herein, and for no

other reason, said plaintiff did not commence suit against said Alfred Jackson Lumber Company, a corporation, to recover said sum of Four Thousand Five Hundred Dollars ($4,500) and did not attach said cargo of white cedar or any portion thereof for said sum of Four Thousand Five Hundred Dollars ($4,-500) or any sum.

XI.

That shortly after said 29th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, became and remained, and ever since has been, and still is, insolvent and unable to pay its debts.

XII.

That as a result of the acts and negligence of defendant as aforesaid, plaintiff has been injured in the sum of Four Thousand Five Hundred Dollars ($4,500).

And for a further and second cause of action against [5] defendant, plaintiff alleges:

I.

That plaintiff is now, and at all of the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Oregon, and having its principal place of business in the city of Bandon, in said State of Oregon; that said plaintiff is now and at all of the times herein mentioned was a citizen and resident of said State of Oregon, and at all of the times herein mentioned did, and still does, conduct and transact a business of general banking in said city of Bandon, State of Oregon.

II.

That defendant is now and at all of the times herein mentioned was a national banking corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the city and county of San Francisco, State of California. That the place where the operations of discount and deposit are carried on by defendant is now, and at all of the times herein mentioned, was the city and county of San Francisco, in the State of California. That the said defendant is now, and at all times herein mentioned was a citizen and resident of the said Northern District of the State of California.

III.

This controversy is wholly between citizens and residents of different states, to wit, a controversy between the plaintiff, a citizen and resident of the State of Oregon, and the defendant, a citizen and resident of the State of California.

IV.

That the controversy herein involves, exclusive of [6] interest, a sum in excess of the sum of Three Thousand Dollars ($3,000), to wit, the sum of Six Thousand Dollars ($6,000).

V.

That for more than one year prior to the 15th day of December, 1913, the defendant herein had been and was the San Francisco correspondent of the plaintiff herein, and that for more than one year prior to the said 15th day of December, 1913, Alfred Johnson Lumber Company, a corporation, was a

client and customer of said plaintiff herein. That said Alfred Johnson Lumber Company, a corporation, was, on the 15th day of December, 1913, and for more than one year prior thereto had been engaged in the business of cutting lumber in and near the said town of Bandon, State of Oregon, and shipping the same by sea to said city and county of San Francisco, State of California, and elsewhere; and that on divers occasions prior to said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, had drawn its draft in favor of said plaintiff herein on the Robert Dollar Company, a corporation, having its principal place of business in the city and county of San Francisco, State of California, against cargoes of lumber shipped from said city of Bandon to the said city and county of San Francisco; that on divers occasions the said plaintiff herein had forwarded said drafts to the said defendant herein for collection and upon receipt from said defendant of the acceptance of said drafts, said plaintiff had on divers occasions paid out the money thereon to the said Alfred Johnson Lumber Company, a corporation.

VI.

That heretofore, and on the said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, made and issued its certain draft in words and figures following, to wit: [7]

"$6,000.00. Bandon, Ore., Dec. 15, 1913.

At sixty days sight pay to the order of Bank of Bandon, Bandon, Ore. Six Thousand and no/100

Dollars value received and charge the same to the account of Alfred Johnson Lumber Co.

S. P. BARTLETT,
Treas.

To the Robert Dollar Co.,
160 California St.,
No. 17. San Francisco."

VII.

That on the said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, delivered said draft to the plaintiff herein and that then and thereupon, and on said 15th day of December, 1913, the said plaintiff herein endorsed on the back of said draft the following:

"Pay to the order of the American National Bank, San Francisco, Cal. All prior endorsements guaranteed. Bank of Bandon, Bandon, Ore.

F. J. FAHY,
Cashier."

and that then and thereupon and on said 15th day of December, 1913, in accordance with the custom established between plaintiff and defendant herein, as aforesaid, forwarded the said draft to the said defendant herein.

VIII.

That thereafter and on the 19th day of December, 1913, the said defendant herein notified and advised the plaintiff that the said draft had been accepted by the said drawee, Robert Dollar Company, a corporation.

IX.

That in truth and in fact, the said draft had not been [8] accepted but that on said 19th day of December, 1913, the said draft was refused acceptance by the said Robert Dollar Company, a corporation; but that the said defendant did not notify said plaintiff that said draft had been refused acceptance until the 29th day of December, 1913.

X.

That on the said 19th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, was and ever since has been indebted to this plaintiff in a sum in excess of the sum of One Thousand Five Hundred Dollars ($1,500); that on the 23d day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, had in said city of Bandon, State of Oregon, a certain cargo of white cedar of the value of about Twelve Thousand Dollars ($12,000), which said cargo of white cedar was shipped in said town of Bandon by the steamer "Grace Dollar" to said city and county of San Francisco, and that if plaintiff had known that said draft had not been accepted, said plaintiff could and would have commenced suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of One Thousand Five Hundred Dollars ($1,500), and could and would have attached said cargo of white cedar, and that by reason of the notice and advice hereinbefore set forth in paragraph VIII herein, and for no other reason, said plaintiff did not commence suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of One

Thousand Five Hundred Dollars ($1,500) and did not attach said cargo of white cedar, or any portion thereof for said sum of One Thousand Five Hundred Dollars ($1,500), or any sum.

XI.

That shortly after said 29th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, became and [9] remained, and ever since has been, and still is, insolvent and unable to pay its debts.

XII.

That as a result of the acts and negligence of defendant, as aforesaid, plaintiff has been injured in the sum of One Thousand Five Hundred Dollars ($1,500).

WHEREFORE, plaintiff prays judgment for Six Thousand Dollars ($6,000), together with interest thereon, and its costs of suit.

MASTICK & PARTRIDGE,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 19, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

In the United States District Court, in and for the Northern District of California, Second Division.

No. 15,831.

BANK OF BANDON, a Corporation,
Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,
Defendant.

Answer.

The defendant, the American National Bank, a corporation, answers the complaint in this action, and denies each and every allegation thereof.

EDGAR C. CHAPMAN,
Attorney for Defendant.
WILLIAM P. HUBBARD,
Of Counsel.

Receipt of a copy of the within Answer is hereby admitted this 28th day of January, 1915.

MASTICK & PARTRIDGE,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 28, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[11]**

At a stated term, to wit, the July term A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Tuesday, the 14th day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,831.

BANK OF BANDON
vs.
AMERICAN NATIONAL BANK.

Order Allowing Plaintiff to File Amended Complaint, etc.

By consent it was ordered that plaintiff may file its amended complaint herein and that the answer heretofore filed stand as the answer to the amended complaint. **[12]**

In the United States District Court, in and for the Northern District of California, Second Division.

BANK OF BANDON, a Corporation,
Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,
Defendant.

Amended Complaint.

Now comes the plaintiff in the above-entitled cause and with leave of Court first had and obtained files this, its amended complaint, and complains and alleges:

I.

That plaintiff is now and at all of the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Oregon, and having its principal place of business in the city of Bandon in said State of Oregon; that said plaintiff is now and at all of the times herein mentioned was a citizen and resident of said State of Oregon, and at all of the times herein mentioned did,

and still does, conduct and transact a business of general banking in said city of Bandon, State of Oregon.

II.

That defendant is now and at all of the times herein mentioned was a national banking corporation organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the city and county of San Francisco, State of California. That the place where the **[13]** operations of discount and deposit are carried on by defendant is now, and at all of the times herein mentioned, was the said city and county of San Francisco, in the State of California. That the said defendant is now and at all times herein mentioned was a citizen and resident of the said Northern District of the State of California.

III.

This controversy is wholly between citizens and residents of different states, to wit, a controversy between the plaintiff, a citizen and resident of the State of Oregon, and the defendant, a citizen and resident of the State of California.

IV.

That the controversy herein involves, exclusive of interest, a sum in excess of the sum of three thousand dollars ($3,000), to wit, the sum of Six Thousand Dollars ($6,000).

V.

That for more than one year prior to the 15th day of December, 1913, the defendant herein had been and was the San Francisco correspondent of the plaintiff herein, and that for more than one year prior to the

said 15th day of December, 1913, Alfred Johnson Lumber Company, a corporation, was a client and customer of said plaintiff herein. That said Alfred Johnson Lumber Company, a corporation, was on the 15th day of December, 1913, and for more than one year prior thereto had been engaged in the business of cutting lumber in and near the said town of Bandon, State of Oregon, and shipping the same by sea to said city and county of San Francisco, State of California, and elsewhere; and that on divers occasions prior to said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, had drawn its draft in favor of said plaintiff herein on the Robert Dollar Company, a corporation [14] having its principal place of business in the city and county of San Francisco, State of California, against cargoes of lumber shipped from said city of Bandon to the said city and county of San Francisco; that on divers occasions the said plaintiff herein had forwarded said drafts to the said defendant herein for collection and upon receipt from said defendant of the acceptance of said drafts, said plaintiff had on divers occasions paid out the money thereon to the said Alfred Johnson Lumber Company, a corporation, and that long prior to the said 15th day of December, 1913, an understanding and agreement had been entered into between the plaintiff and the defendant herein, to the effect that in the event that any draft forwarded by plaintiff to defendant for collection, should be dishonored or refused payment, in excess of the sum of $500, that the said defendant should immediately thereupon no-

tify the said plaintiff by telegraph.

VI.

That heretofore, and on the said 15th day of December, 1913, the said Alfred Johnson Lumber Company, a corporation, made and issued its certain draft in words and figures following, to wit:

"$6,000.00 Bandon, Ore., Dec. 15, 1913.

At sixty days sight pay to the order of Bank of Bandon, Bandon, Ore. Six Thousand and no/100 Dollars value received and charge the same to the account of Alfred Johnson Lumber Co.

S. P. BARTLETT,
Treas.

To the Robert Dollar Co.
160 California St.,
San Francisco, Cal.

'No. 17.''

VII.

That on said 15th day of December, 1913, the said Alfred [15] Johnson Lumber Company, a corporation, delivered said draft to the plaintiff herein and that then and thereupon, and on said 15th day of December, 1913, the said plaintiff herein endorsed on the back of said draft the following:

"Pay to the order of the American National Bank, San Francisco, Cal. All prior endorsements guaranteed. Bank of Bandon, Bandon, Ore.

F. J. FAHY,
Cashier."

and that then and thereupon and on said 15th day of December, 1913, in accordance with the custom

established between plaintiff and defendant herein, as aforesaid, forwarded the said draft to the said defendant herein.

VIII.

That thereafter and on the 19th day of December, 1913, the said defendant herein notified and advised the plaintiff that the said draft had been accepted by the said drawee Robert Dollar Company, a corporation.

IX.

That in truth and in fact the said draft had not been accepted but that on said 19th day of December, 1913, the said draft was refused acceptance by the said Robert Dollar Company, a corporation; but that the said defendant did not notify said plaintiff that said draft had been refused acceptance until the 29th day of December, 1913.

X.

That the said defendant did not cause the said draft to be protested on said 19th day of December, 1913, or at any other time, until the 30th day of December, 1913, nor did the said defendant cause any notice of protest or of the dishonor of the said draft to be given to the said Alfred Johnson Lumber Company, the drawer of said draft, until notice of said protest and of said dishonor were sent to the said Alfred Johnson Lumber **[16]** Company, in Bandon, Oregon, which said protest was mailed to the said drawer of said draft on the 30th day of December, 1913, and arrived in the said town of Bandon on the 3d day of January, 1914.

XI.

That the said plaintiff paid out to the said Alfred Johnson Lumber Company the sum of $5,887.78, which said sum of $5,887.78 was used by said Alfred Johnson Lumber Company, a corporation, for its pay-roll at said lumber mill, and that the labor for which said $5,887.78 was expended, by the said Alfred Johnson Lumber Company, a corporation, was used to produce a certain cargo of white cedar, and that prior to the said 29th day of December, 1913, and subsequent to the 19th day of December, 1913, and the receipt of notice and advice hereinbefore set forth at paragraph VIII herein, the said cargo of white cedar was worth the sum of Twelve Thousand Dollars ($12.000) and was shipped in said town of Bandon by the steamer "Grace Dollar" to said city and county of San Francisco, and that if said plaintiff had known that said draft had not been accepted, said plaintiff could and would have commenced suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of $5,887.78, and could and would have attached said cargo of white cedar, and that by reason of the notice and advice hereinbefore set forth in paragraph VIII herein, and for no other reason, said plaintiff did not commence suit against said Alfred Johnson Lumber Company, a corporation, to recover said sum of $7,887.78, and did not attach said cargo of white cedar or any portion thereof for said sum of $7,-887.78, or any sum.

XII.

That shortly after said 29th day of December,

1913, the said Alfred Johnson Lumber Company, a corporation, became and remained, and ever since has been, and still is, insolvent and unable to pay its debts. **[17]**

XIII.

That as a result of the acts and negligence of defendant as aforesaid, plaintiff has been injured in the sum of $5,887.78.

WHEREFORE, plaintiff prays judgment for the sum of Five Thousand Eight Hundred Eighty-seven and 78/100 Dollars ($5,887.78), together with interest thereon, and its costs of suit.

MASTICK & PARTRIDGE,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 14, 1915. Walter B. Maling, Clerk. [18]

In the United States District Court, in and for the Northern District of California, Second Division.

No. 15,831.

BANK OF BANDON, a Corporation,
Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,
Defendant.

Answer to Amended Complaint.

Comes now the defendant herein, and in answer to plaintiff's amended complaint, denies generally and specifically each and all and every allegation therein contained.

WHEREFORE, defendant prays that it be hence dismissed with its costs herein.

EDGAR C. CHAPMAN,
Attorney for Defendant.
WM. P. HUBBARD,
Of Counsel.

[Endorsed]: Filed September 15, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[19]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,831.

BANK OF BANDON, a Corporation,
Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,
Defendant.

Verdict.

We, the jury, find in favor of the plaintiff, and assess the damages against the defendant in the sum of Five Thousand Eight Hundred and Eighty-seven 78/100 Dollars.

A. W. LAWSON,
Foreman.

[Endorsed]: Filed Sept. 15, 1915. Walter B. Maling, Clerk. **[20]**

In the United States District Court, in and for the Northern District of California, Second Division.

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,

Defendant.

Judgment on Verdict.

This cause having come on regularly for trial upon the 14th day of September, 1915, being a day in the July, 1915, term of said court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issues joined herein; John S. Partridge, Esq., appearing as attorney for plaintiff, and W. P. Hubbard and Edgar C. Chapman, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 14th and 15th days of September, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys, and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Five Thousand Eight Hundred and Eighty-seven 78/100 dollars. A. W. Lawson, Foreman,"

and the Court having ordered that judgment be entered in accordance with said verdict and for costs.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the Bank of Bandon, a corporation, plaintiff, do have and recover of and from American National Bank, a corporation, defendant, the sum of Five Thousand Eight Hundred Eighty-seven and 78/100 ($5,887.78) Dollars, together with its costs in this behalf expended taxed at $59.65. **[21]**

Judgment entered September 15, 1915.

WALTER B. MALING,
Clerk.

A true copy. Attest:

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed September 15, 1915. Walter B. Maling, Clerk. **[22]**

In the District Court of the United States, for the Northern District of California.

No. 15,831.

BANK OF BANDON

vs.

AMERICAN NATIONAL BANK.

(Clerk's Certificate to Judgment-roll.)

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the

above-entitled action.

ATTEST my hand and the seal of said District Court, this 15th day of September, 1915.

[Seal] W. B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed September 15, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[23]**

In the District Court of the United States, for the Northern District of California, Second Division.

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,
Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,
Defendant.

Engrossed Bill of Exceptions.

BE IT REMEMBERED: That on the 14th and 15th days of September, 1915, the above-entitled cause came on for trial before the Court and a jury duly empaneled.

The Honorable WILLIAM C. VAN FLEET, presiding.

The plaintiff appearing by John S. Partridge, Esq., of the firm of Mastick & Partridge, as counsel

for plaintiff; and defendant appearing by Edgar C. Chapman, Esq., and William P. Hubbard, Esq., as counsel for defendant. Thereupon the following proceedings were had:

It was stipulated and agreed that the plaintiff, Bank of Bandon, was at all the times mentioned in the complaint and is a banking corporation incorporated under the laws of the State of Oregon, with its principal place of business at Bandon, Oregon; and that the defendant, the American National Bank, was at all the times mentioned in the complaint a national banking corporation with its principal place of business in the city and county of San Francisco, in the Northern District of California.

[Testimony of J. L. Kronenberg, for Plaintiff.]

J. L. KRONENBERG, a witness called and sworn on behalf of the plaintiff, testified in substance as follows: **[24]**

Just at the present time I am residing in Marin County, but my home is in Bandon, Oregon. I am, and ever since the plaintiff bank was incorporated ten or eleven yearsago, have been president of that corporation.

I know a company or corporation known as the Alfred Johnson Lumber Company. They did business at or near Bandon, Oregon. Their business was manufacturing lumber. For some time prior to the 15th of December, 1913, the plaintiff, Bank of Bandon, had business dealings with the Alfred Johnson Lumber Company. I could not state just the length of time prior to that, but I would say approximately

(Testimony of J. L. Kronenberg.)

two years prior. The Alfred Johnson Lumber Company were customers of the Bank of Bandon, and at regular intervals they discounted drafts on the Robert Dollar Company of San Francisco. Their regular pay-roll draft was once a month, on the 15th. We forwarded the drafts to the American National Bank for collection—presentation and acceptance, rather, and collection when due. We always did that during that time. Our understanding with the defendant, American National Bank, was that any item over $500 they would wire nonacceptance, in the event that any draft was refused payment. The defendant was the only correspondent that the Bank of Bandon had at that time in San Francisco. That understanding was arrived at by letter I believe. I remember the plaintiff having received a draft from the Alfred Johnson Lumber Company on the 15th day of December, 1913. The paper you are now showing me is that draft.

The plaintiff offered the said draft referred to, and the same was admitted in evidence and marked "Plaintiff's Exhibit No. 1," and is in the words and figures following:

[Plaintiff's Exhibit 1—Draft December 15, 1913.]

$6,000.00 Bandon, Ore., Dec. 15, 1913.

At sixty days sight, Pay to the order of Bank of Bandon, Bandon, Ore., Six Thousand & No/100 Dol-

(Testimony of J. L. Kronenberg.)

lars, Value received and charge the same to account of [25]

ALFRED JOHNSON LUMBER CO.
S. P. BARTLETT,
Treas.

To the Robert Dollar Co.
160 California St. San Francisco, Cal.
No. 97 22074.

There was written on the face of the draft, in red ink, the following: "Accepted Dec. 21, 1913. Date Payable Feby. 19, 1914," with a rubber stamp, but no signature to the acceptance. In red ink is written: "Protested for nonpayment this 30th day of Dec., A. D. 1913. Charles Edelman, Notary Public." On the back of the draft appears the following: "Pay to the Order of The American National Bank 11–24 San Francisco, Cal. All previous endorsements guaranteed. Bank of Bandon 96–88 Bandon, Oregon. F. J. Fahey, Cashier." Also on the back of the draft is written: "Don't care to accept it. H. M. Lorber." And also the following, written in ink: "Advised acceptance 12–19–13."

WITNESS.—(Continuing.) As soon as that draft was discounted we proceeded to pay on it. I think that the money was used by the Alfred Johnson Lumber Company almost entirely for pay-roll. That draft was forwarded to San Francisco to the American National Bank. The first information that I had from the American National Bank concerning that draft was a mail advice to the effect that the

(Testimony of J. L. Kronenberg.)

draft had been accepted. The paper that you are now showing me is the advice to which I refer.

The plaintiff offered the same, and it was admitted in evidence and marked "Plaintiff's Exhibit No. 2," and is in the words and figures following:

[Plaintiff's Exhibit No. 2—Advice Reacceptance of Draft.]

"The American National Bank of San Francisco.

San Francisco, Cal., 12–19–13.

Bank of Bandon, Ore.

We enter for collection the following:

Your Date 12–15 Robert Dollar, 6,000. Accepted. Payable 2–17–14." [26]

WITNESS.—(Continuing.) After we got the notice on the 19th of December notifying us that the draft was accepted, we heard from it again on the 29th of December by wire. The paper which you are now showing me is the telegram which we received, and the other paper which you are showing me is the letter which we received, sent the same day, and containing a translation of the telegram.

Here the plaintiff offered the said telegram, and the same was admitted in evidence and marked "Plaintiff's Exhibit No. 3," and the same is in the words and figures following:

[Plaintiff's Exhibit No. 3—Telegram, American National Bank to Bank of Bandon.]

COOS BAY HOME TELEPHONE CO.

Telegram.

Recording Opr. Number. Time Filed. Check.

1–3 3.59 P. M. 22 Pd. Via Mfed.

BANK OF BANDON, Bandon.

Zabbies item dollar jabbering yours fifteenth acceptance advised in error by us quabbeln unless otherwise advised by wire will return without protest.

AMERICAN NATIONAL BANK.

Recd. 12/29/13.

Ans. 12/29/13.

The plaintiff offered the said letter referred to by the witness, and the same was admitted in evidence and marked "Plaintiff's Exhibit No. 4," and is in the words and figures following:

[Plaintiff's Exhibit No. 4—Letter, December 29, 1913, D. B. Fuller, Cashier to Bank of Bandon.]

The American National Bank of San Francisco.

San Francisco, December 29, 1913.

Bank of Bandon, Bandon, Ore.

Dear Sirs: We telegraphed you this day as follows:

"Item Dollar $6000 yours fifteenth, acceptance advised in error by us. Acceptance refused. Unless otherwise advised by wire will return without pro-

(Testimony of J. L. Kronenberg.)

test." Which we now confirm.

Yours respectfully,

D. B. FULLER,
Cashier.

Received Jan. 2, 1914. [27]

WITNESS.—(Continuing.) The paper which you hand me is a night letter of the same date, which was sent by the Bank of Bandon to the American National Bank.

The plaintiff offered the same, and it was admitted in evidence and marked "Plaintiff's Exhibit No. 5," and is in the words and figures following:

[Plaintiff's Exhibit No. 5—Night Letter, December 29, 1913, Bank of Bandon to American National Bank.]

Bandon, Ore., Dec. 29, 1913.

American National Bank,
San Francisco, Cal.

Answering your wire today cannot accept return of Dollar item, for we have paid out on your notice of acceptance nineteenth and for that your correction wired of twenty-ninth came too late for us to protect ourselves, and out of due course would suggest you see about it personally as they may now accept and if not would suggest protest; they should have cargo there now to cover item.

BANK of BANDON,
4.15 A. M.

WITNESS.—(Continuing.) It is a fact that the Bank of Bandon had paid out some money on the

(Testimony of J. L. Kronenberg.)

draft. I could not say positively whether that was prior to the 29th that we paid out all the money on the draft; the books will show. During the time between the 19th of December, the date when the draft was refused by the Robert Dollar Company, and the 29th of December, the day when we were notified by the American National Bank that it had been refused, there was property in Bandon by which the Bank of Bandon could have protected itself. It consisted of a cargo of Port Orford cedar, or white cedar. I could not say when that cedar was put on the dock, but it was previous to the 15th of December. The vessel started loading about the 21st of December, 1913, and sailed on the 24th of December, 1913. The name of the vessel was the "Grace Dollar" and she was bound for San Francisco. The value of that cargo of cedar was approximately $10,000 to $12,000. [28]

Plaintiff thereupon offered the protest of said draft, and the same was admitted in evidence, marked "Plaintiff's Exhibit No. 6," and is in the words and figures following:

[Plaintiff's Exhibit No. 6—Protest.]

UNITED STATES OF AMERICA.

State of California,
City and County of San Francisco,—ss.

On the 30th day of December, in the year of our Lord one thousand nine hundred and thirteen, at the request of The American National Bank of San Francisco, Cal., holder of the Draft hereinafter set forth, I, Charles Edelman, Notary Public, duly com-

missioned and sworn, dwelling in the City and County of San Francisco, did, during business hours of said day, present the original Draft (a copy of which is endorsed on the reverse of this sheet) at the office of The Robert Dollar Co., the drawee thereof, in this City and Co., and demanded acceptance of same of H. M. Lorber, Esq., the Secty. of said Company, which he refused, saying: "Do not care to accept it."

Whereupon I, the said Notary, at the request aforesaid, did Protest, and by these Presents do publicly Protest, as well *as* against the Drawer and Endorsers as against all others whom it doth or may concern, for Exchange, Re-exchange, and all Costs, Damages and Interests, already incurred or to be hereafter incurred for the non-acceptance of the said Draft.

I do Hereby Certify, That on the 30th day of December, A. D. 1913, notice of Protest, Demand and non-acceptance of the above mentioned Draft was served upon the drawer and endorser by depositing the same in the United States Postoffice in this City, postage fully prepaid thereon, directed as follows:

Alfred Johnson Lumber Co.,
S. P. Bartlett, Treas. (Drawer.)
Bandon, Oregon.
Bank of Bandon. (Endorser.)
Bandon, Oregon. [29]

such being the reputed places of residence of said respective parties and the postoffices nearest thereto according to the best information I could obtain.

(Testimony of J. L. Kronenberg.)

Thus Done and Protested, in the City and County of San Francisco aforesaid the days and year above written.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires April 9th, 1914."

Endorsed: $6000.00.

Bandon, Ore. Dec. 15,1913.

At sixty days sight Pay to the order of Bank of Bandon, Ore., Six Thousand & no/100 Dollars, Value received, and charge the same to account of,

ALFRED JOHNSON LUMBER CO.
S. P. BARTLETT,
Treas.

To The Robert Dollar Co.
160 California St., San Francisco, Cal.
No. 97. 22074.

Endorsed:

"Pay to the Order of The American National Bank. 11–24 San Francisco, Cal. 11–24.

All previous endorsements guaranteed. BANK of BANDON, 96–88 Bandon, Oregon, 96–88.

F. J. FAHY,
Cashier."

WITNESS.—(Continuing.) I know George P. Topping. He is and has been attorney for the Bank of Bandon, and at the time the bank received this notification from the American National Bank with regard to the refusal of this draft I consulted Mr.

(Testimony of J. L. Kronenberg.)

Topping and authorized him to wire to the American National Bank.

Plaintiff offered telegram from George P. Topping to American National Bank, and the same was admitted in evidence, marked Plaintiff's Exhibit No. 7, and the same is as follows: [30]

[Plaintiff's Exhibit No. 7—Telegram, December 30, 1913, George P. Topping to American National Bank.]

Bandon, Ore., Dec. 30, 1913.

American National Bank, San Francisco, Cal.

Bank of Bandon refers your wire thirtieth to me for you in reference to Dollar item as they understand you wish some action taken here; they have no lien on any shipment or cargo; about five hundred thousand at mill; cannot hold except by attachment; await your advice, letter following.

GEORGE P. TOPPING.

WITNESS.—(Continuing.) The paper which you now show me is a telegram from the Bank of Bandon received from the American National Bank.

Plaintiff offered said telegram, and the same was admitted in evidence and marked Plaintiff's Exhibit No. 8, and the same is in the words and figures following:

(Testimony of J. L. Kronenberg.)

[Plaintiff's Exhibit No. 8—Telegram, 12/30/13, American National Bank to Bank of Bandon.]

San Francisco, 12–30–13.

Bank of Bandon,
Bandon.

Dollar Company advises no cargo to cover if you have lien on any particular shipment. Take immediate legal option to prevent delivery, as drawers of draft have been placed in involuntary bankruptcy by Dollar. If you cannot gain possession of cargo, file claim with receiver and send us copy of proof of claims.

AMERICAN NATIONAL BANK.

WITNESS.—(Continuing.) The Bank of Bandon received the wire which you are now showing me from the American National Bank.

Plaintiff offered the same, and it was admitted in evidence, marked Plaintiff's Exhibit No. 9, and is in the words and figures following:

[Plaintiff's Exhibit No. 9—Telegram, 12/31/13, American National Bank to Bank of Bandon.]

San Francisco, 12–31–13.

Bank of Bandon,
Bandon.

We have telegram from Geo. P. Topping whom we do not know. We decline to deal with him direct at this time, expect you to [31] take any and all legal steps to protect all parties concerned and await full statement from you as to when and how advance

(Testimony of J. L. Kronenberg.)

was made to Johnson Company.

AMERICAN NATIONAL BANK.

Received January 2, 1914.

WITNESS.—(Continuing.) The letter which you are now showing me was received by the Bank of Bandon from the American National Bank.

Plaintiff offered the said letter, and the same was admitted in evidence and marked "Plaintiff's Exhibit 10," and is in the words and figures following:

[Plaintiff's Exhibit No. 10—Letter, December 31, 1913, D. B. Fuller, Cashier, to Bank of Bandon.]

THE AMERICAN NATIONAL BANK of San Francisco.

Dec. 31, 1913.

Registered.

Bank of Bandon, Bandon, Oregon.

Gentlemen: Referring to interchange of telegrams regarding the Alfred Johnson Lumber Co. draft, which we, in error, advised you as having been accepted, we enclose the same herewith, duly protested, believing that the documents can be handled to better advantage by you than by us.

This morning we received the following Night Letter from Mr. Geo. P. Topping:

"American National Bank, San Francisco, Cal.

Bank of Bandon refers your wire thirtieth to me for you in reference to Dollar item as they understand you wish some action taken here. They have no lien on any shipment or cargo, about five hundred thousand at mill. Cannot hold except by attach-

ment. Await your advice. Letter following."

To which we replied as follows:

"Bank of Bandon, Bandon, Ore.

We have telegram from Geo. P. Topping whom we do not [32] know. We decline to deal with him direct at this time. Expect you to take any and all legal steps to protect all parties concerned and await full statement from you as to when and how advance was made to Johnson Company."

We take it that Mr. Topping's message was sent without consultation with you and with the main idea of fixing the responsibility on us. This was entirely unnecessary, as we never try to evade an issue. If we were the cause of your making a loss on the transaction, we will expect to suffer the penalty, but on the other hand if the draft was given to you in cover of an obligation already created, and if the delay in receiving notice of its non-payment in no way jeopardized your position, we will expect you to carry the burden.

We have learned through the Robert Dollar Company that the Alfred Johnson Company knew that their draft had not been accepted, and if they obtained an advance from you on the strength of such acceptance, they were perpetrating a fraud and there should be some way of holding the responsible parties criminally.

Awaiting your reply to our message of this morning and a full statement from you regarding the transaction, we remain, Yours very truly,

D. B. FULLER,

Cashier.

(Testimony of J. L. Kronenberg.)

WITNESS.—(Continuing.) The paper which you are now showing me is a letter by the Bank of Bandon to the American National Bank.

Plaintiff offered the said letter, and it was admitted in evidence and marked Plaintiff's Exhibit No. 11, and is in the words and figures following:

[Plaintiff's Exhibit No. 11—Letter, January 6, 1914, Bank of Bandon to American National Bank.]

Jan. 6, 1914.

American National Bank, San Francisco, Calif. [33]

Gentlemen: Referring to your letter of December 31st, in reference to Alfred Johnson Lumber Company draft, on Robert Dollar Company for $6,000.00, beg to reply as follows:

The message from Mr. Topping, received by you December 31st and referred to in yours of that date, was worded by Mr. Topping, being worded and sent by him after consultation with our Mr. Fahy, and arose out of our construction or understanding of your telegram of December 30th.

First, we received yours of December 19th advising acceptance of draft. The next advice we had on that item was your message of December 29th which we understand to read as follows:

"Item Dollar $6,000 yours fifteenth, acceptance advised in error by us. Acceptance refused, unless otherwise advised by wire, will return without protest.

AMERICAN NATIONAL BANK."

To this message we wired you the following answer:

"Bandon, Ore., Dec. 29, 1913.

American National Bank, San Francisco, Calif.

Answering your wire to-day, cannot accept return of Dollar item for we have paid out on your notice of acceptance December 19th, and for that your correction wire of 29th came too late for us to protect ourselves and out of due course would suggest you see Dollar personally, as they may now accept, if not would suggest protest. They should have cargo there now to cover item.

BANK OF BANDON."

In answer to last above message, we received from you the following wire:

"San Francisco, 12–30–13.

Bank of Bandon, Bandon. **[34]**

"Dollar Company advises no cargo to cover, if you have lien on any particular shipment take immediate legal action to prevent delivery, as drawers of draft have been placed in involuntary bankruptcy by Dollar. If you cannot gain possession of cargo file claim with receiver and send us copy of proof of claims.

"AMERICAN NATIONAL BANK."

On receipt of last above-mentioned message we construed the same as directory instructions, and as the points raised in your message 12–30–13 raises legal questions we submitted the matter to Mr. Topping for his action, as we understood it, on your behalf. Mr. Topping advises us that he at once wired you as follows—after consultation with our Mr.

Fahy—and wrote you at the same time, to wit:

"Message. Bandon, Ore., Dec. 30, 1913.

Bank of Bandon refers your wire 30th to me for you in reference Dollar item, as they understand you wish some action taken here. They have no lien on any shipment or cargo, about 500,000 at mill, cannot hold except by attachment. Await your advice, letter following.

GEO. P. TOPPING."

To which we received the following reply from you:

"San Francisco, 12–31–13.

Bank of Bandon, Bandon.

We have telegram from Geo. P. Topping whom we do not know. We decline to deal with him direct at this time expect you to take any and all legal steps to protect all parties concerned and await full statement from you as to when and how advance was made to Johnson Company.

AMERICAN NATIONAL BANK."

Now, yours of December 31st confirms the last two messages and our letter of January 3d and the one of to-day **[35]** we think confirms or recites all others and we trust correctly and as sent. This brings us again up to the last part of your letter of December 31st, page 2.

Mr. Topping's message of December 30th in answer to yours of December 30th was, as we have said, worded and sent by him after consultation with our Mr. Fahy, and with the understanding on our part and on the part of Mr. Topping on the interpretation

of your message of the 30th, that you wished some action taken on your behalf.

In further consideration of your letter, will state that the draft was not given to us to cover an obligation already created, but as stated in ours of January 3d and was a pay-roll draft. We in turn wish to say that we do not wish you people to feel that we desire in any way to shift any responsibility legally belonging to us.

In reference to the matter of the Alfred Johnson Lumber Company knowing that their draft had not been accepted and as to the question of fraud on their part or on the responsible parties, will say that we will investigate this phase of the situation, and in conclusions, and in consideration of all the correspondence will say that we are watching the matter closely and are endeavoring to protect the interest of both yourselves and our own in any way we can.

We find that there is a cargo of Fir on the mill docks as we have previously advised you, and that the 'Grace Dollar' is about to load this cargo, but we have concluded that it is not advisable to attach or try to hold the same, as the expense of taking same off of the mill wharf would consume too great a portion of its value, as it is not a very valuable cargo and to attach it and leave it on the wharf would leave the labor liens for December all against it, [36]

We will, however, endeavor to keep a close watch and will keep you advised of any particulars desired by you.

Yours truly."

(Testimony of J. L. Kronenberg.)

WITNESS.—(Continuing.) The paper which you are now showing me is a letter which the Bank of Bandon received from the American National Bank.

Plaintiff offered the said letter, which was admitted in evidence and marked Plaintiff's Exhibit 12, and the same is in the words and figures following:

[Plaintiff's Exhibit No. 12—Letter, January 6, 1914, D. B. Fuller, Cashier, to Bank of Bandon.]

THE AMERICAN NATIONAL BANK OF SAN FRANCISCO.

January 6, 1914.

Bank of Bandon, Bandon, Oregon.

Gentlemen: Since writing you on December 31st, we are in receipt of your favor of December 29th, and a letter from Mr. Topping dated December 30th.

We are advised by the Robert Dollar Company this morning that Mr. Stanley Dollar should reach your city to-day. It is the intention of the Dollar Company, if they can gain the consent of all parties concerned, to have the affairs of the Johnson Company turned over to them as Trustee, to avoid the appointment of a Receiver; this to be done for the reason that their attorney's estimate of the cost of Receiver proceedings was about $15,000.

We have great confidence in Mr. Dollar and his ability to pull the Johnson Company through, and are of the belief that all creditors should join in the appointment of a Trustee. If any attachments have already been levied they would be of no avail if the Company were forced into bankruptcy, and if not

(Testimony of J. L. Kronenberg.)

released to the Trustee would result in bankruptcy proceedings to the detriment of all concerned.

We expect to hear from the Dollar Company to-day or [37] to-morrow as to what action Mr. Stanley Dollar will take. If we deem it advisable, will wire you on the subject.

Very truly yours,
D. B. FULLER,
Cashier.

Received Jan. 9, 1914.

WITNESS.—(Continuing.) After the Bank of Bandon received the wire of December 29th advising that the draft had been refused, there was no property of the Alfred Johnson Lumber Company that I know of which the Bank of Bandon could have attached or by which it could have protected itself.

The COURT.—Q. Did you have the situation looked into by your counsel? A. We did.

The COURT.—Q. Did he report to you that there was no available property on hand to respond to this demand? A. Yes, sir.

Cross-examination.

I could not say positively how long the Alfred Johnson Lumber Company had been dealing with the bank on the 15th of December, 1913; one or two years, I think. This draft was first deposited with the Bank of Bandon on the 15th of December, I think. At that time the Alfred Johnson Lumber Company had a commercial account with the Bank of Bandon. I could not state to you the status of that

(Testimony of J. L. Kronenberg.)

commercial deposit account of the Johnson Lumber Company on the 15th of December. We have here the ledger sheets, I believe, which would show that. The bookkeeper is here who kept the ledger at that time. I think that the Bank of Bandon on the 15th of December held paper of the Alfred Johnson Lumber Company other than this draft. I could not state the amount. The bookkeeper here can possibly answer that question. The books will show when the amount of this draft was credited by the Bank of Bandon to the account of the Alfred Johnson Lumber Company. I could. [38] not say positively aside from the books, but I think it was on the 15th.

The first knowledge the Bank of Bandon had from the American National Bank that the draft had not been accepted was on the 29th of December. I could not say positively the amount of money which was advanced by the Bank of Bandon to the Alfred Johnson Lumber Company in the interim between the 15th of December and the 29th of December. I could not say positively what property the Alfred Johnson Lumber Company had at Bandon from the 15th of December, 1913, until January 6th, 1914. They were in the lumber business. They owned a lumber mill and were operating logging camps. They were manufacturing approximately from 80,000 to 90,000 feet of lumber per day, I think. They had a mill that would cut about 80,000 feet. I could not say positively the value of the plant. I do not know whether or not there was at the yard of the mill or anywhere around about there lumber from Decem-

(Testimony of J. L. Kronenberg.)

ber 15th until January 5th or 6th. I could only answer approximately as to the quantity of lumber there was; I suppose 700,000 or 800,000 feet between the 15th and the 29th of December. I should judge the value of that was $10,000 to $12,000. It left there— at least the vessel sailed on the 24th of December, carrying this cargo. That was the white cedar. After the 24th of December, there was probably 500,000 feet of lumber there at the mill. The value of that would be a little more *than pay* the freight to San Francisco; that would be $4 or $5 a thousand. Aside from this the Alfred Johnson Lumber Company had the mill. I guess the value of that was not very much, subject to the mortgage against it. The mortgage was approximately $10,000. The value of the mill, I could not say, and I have no idea. I could not say whether the Alfred Johnson Lumber Company had [39] any other property than that.

The face of the draft was credited to the Alfred Johnson Lumber Company before the Bank of Bandon had received any information of any kind from the American National Bank. I could not give you the exact amount of that $6,000 which had been credited to the Alfred Johnson Lumber Company on that draft which was paid out or disbursed in the interim between December 15th and December 29th, 1913, but I think approximately $4,500 or $5,000. I think there are books here of the Bank of Bandon which will show that, and they are in custody of an officer of that Bank in Court. After the 29th of December,

(Testimony of J. L. Kronenberg.)

1913, our bank did not attempt to levy on any property.

The COURT.—Q. What did you do? Did you put the matter into the hands of your counsel?

A. We put the matter in our attorney's hands.

WITNESS—(Continuing.) The attorney examined into the matter and concluded there was nothing to attach. He arrived at that conclusion by personal search.

Some time prior to the deposit of that draft in the Bank of Bandon, we had a statement of the general affairs of the Alfred Johnson Lumber Company. I could not tell the exact date; it was within sixty days, though, I would think, of December 15th. I could not tell you in a general way what that statement showed as to the Alfred Johnson Company's financial standing. I think it showed they were solvent. I do not know how much it showed its assets exceeded its liabilities at that time. I did say that the Bank of Bandon had some other paper of the Alfred Johnson Lumber Company at that time. The Bank of Bandon had no collateral security from the Alfred Johnson Lumber Company for that paper. **[40]**

The COURT.—Q. Did any of the items covered by that additional paper enter into this amount that you charged against this draft?

A. No, sir; they were drafts of a similar nature drawn previous to that time.

Q. And upon which some balances remained?

A. They had probably been checked out or mostly

(Testimony of J. L. Kronenberg.)

so, but there were some drafts drawn previous to the 15th of December that were with the American National Bank, accepted, but not yet paid.

COUNSEL FOR PLAINTIFF.—Q. Subsequently paid?

A. Yes, sir. All that had been accepted were promptly paid when due.

The WITNESS.—(Continuing—Under Cross-examination.) Neither the Bank of Bandon nor myself had any knowledge or information as to how much the Alfred Johnson Lumber Company were indebted to the Robert Dollar Company between December 15th and December 29th, 1913. We thought likely they were indebted to some extent to the Robert Dollar Company. The thing that gave us that information was in the due course of business; it is a general rule that the lumber agents provide funds for the mill's operation.

The COURT.—Q. Was the Dollar Company the lumber agents of the Johnson Company?

A. Yes, sir.

The WITNESS.—(Continuing—Under Cross-examination.) I could not say that this financial statement which I saw about six days prior to December 15th, showing the state of affairs of the Johnson Company, showed that at that time they were indebted to the Robert Dollar Company in the sum of $100,000 or a little more. I don't recollect any figures in **[41]** that connection. I could not say approximately or in a general way.

(Testimony of J. L. Kronenberg.)

The COURT.—What is the materality of that?

Mr. HUBBARD.—No inference could be drawn from the fact that they simply drew on the Dollar Company that that draft would be accepted, and therefore they were not entitled to extend any credit upon any draft at that time, thinking that it would be accepted.

The COURT.—That would depend upon the course of business. If, during the existence of a situation of that kind for a considerable period, the drafts nevertheless were regularly accepted, they would have a right to rely upon that, unless they had some information to the contrary. I simply wanted to get at the materiality of the inquiry.

Mr. HUBBARD.—The materiality of it was to show that the Dollar Company at that time was a large creditor of this Johnson Company, and that the bank was not in any position to assume that that particular draft for some $6,000 would be accepted by the Dollar Company when the Dollar Company was then a creditor in the amount of some $100,000.

WITNESS.—(Continuing.) I did say this morning that the credit was made on the 15th of the amount of this draft to the Johnson Company, and also that the bank would have attached and could have protected itself by attaching this cargo of cedar during the interim between the 15th and the 29th of December, 1913, had the bank known that the draft had not been accepted. I certainly would have attached between December 15th and December 29th

(Testimony of J. L. Kronenberg.)

had I known that the draft was not going to be accepted, in order to protect ourselves. I could not say whether the Johnson Company at that time was in condition to have paid the Bank of Bandon aside from this **[42]** cargo of lumber. We would have attached to protect the draft, of course. We had no way of knowing what the assets of the Johnson Lumber Company were, and we would have immediately attached, had *it* known that the draft was not going to be accepted. We did not know at that time, or at all times, that even had we attached that cargo or any other property of the Alfred Johnson Lumber Company that it would have been a needless and futile act, or that it would have plunged the Alfred Johnson Lumber Company into bankruptcy. We considered that it was solvent, and, believing that it was solvent, I certainly would have attached that cargo had I known that the draft was not going to be accepted. Regardless of whether I knew it was solvent or insolvent, if I had known that draft was not going to be paid, I, as a banker, having done business with this customer for some years, would have attached that cargo.

I have not the letter which I referred to in my direct examination as to the custom between the defendant and the plaintiff. That letter is supposed to be in the Bank of Bandon; it is not here, and I have no copy of it.

The COURT.—A custom is not established by writing; a custom is established by the usual and

(Testimony of J. L. Kronenberg.)

ordinary course of business prevailing between parties.

Mr. HUBBARD.—The letter would be the beginning of that, your Honor.

The COURT.—No, a letter need not be the beginning of a custom; a letter might suggest that they would abide by a certain course of dealing, and then that is a contract that is assented to. A custom is an entirely different thing, not dependent upon writing at all.

Mr. HUBBARD.—We understand that, your Honor, as a rule of law. **[43]**

Redirect Examination.

When I testified in my cross-examination as to whether or not the Bank of Bandon held any other paper of the Alfred Johnson Lumber Company, I referred to similar drafts drawn previous to the draft in question. These drafts had all been accepted by the Robert Dollar Company, and the plaintiff had been so notified by the defendant. Those drafts were promptly paid when due, and the plaintiff did not hold any paper of the Alfred Johnson Lumber Company except those drafts which had been accepted by the Robert Dollar Company.

[Testimony of L. E. Gallier, for Plaintiff.]

L. E. GALLIER, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

I reside at Bandon, Oregon. I am bookkeeper in the Bank of Bandon, and have been such for about

(Testimony of L. E. Gallier.)

two years. One of these books I have is the cash-book sheet; the other is a general ledger sheet, and these other two are individual ledger pages—the account of the Alfred Johnson Lumber Company with the Bank of Bandon. These are the original sheets taken from the loose ledger, journal and cash-book. These books are mostly kept by me.

The same were then offered by the plaintiff and were admitted in evidence and marked Plaintiff's Exhibit No. 13 and are in the words and figures following:

The portions of which said books used and referred to on the trial are as follows:

[Plaintiff's Exhibit No. 13—Ledger Pages, of Account of Alfred Johnson Lumber Co., With Bank of Bandon.]

Ledger sheet which shows the following:

Name, ALFRED JOHNSON LBR. CO.
Address, City.
1913.

Dec. 15.	Overdraft.....	175.02	
15.	Credit of		5905.00
	And the following checks: [44]		
15.	.....	253.07	
16.	.....1890.70		
17.	.....	575.68	
17.	.....	288.87	
18.	.....	952.87	
19.	.....	326.17	

(Testimony of L. E. Gallier.)

20.	261.16
22.	237.15
23.	232.79
24.	268.10
26.	172.32
27.	46.00
27.	27.50
29.	3.15

WITNESS.—(Continuing.) Reading from these exhibits, it appears that on the 15th of December, 1913, there was credited by the Bank of Bandon to the Alfred Johnson Lumber Company $5,905. The thing that caused that credit was the deposit of a sixty-day draft on the Robert Dollar Company written by the Alfred Johnson Lumber Company. The reason that the credit is shown as only $5,905, when the draft was $6,000, is that there was exchange and discount taken on the draft.

On the 15th of December, 1913, there was advanced by the Bank of Bandon to the Alfred Johnson Lumber Company upon that draft, $253.07; on the 16th, $1,890.07; on the 17th, $575.68; and $288.87; on the 18th, $952.87; on the 19th, $326.17; on the 20th, $261.16; on the 22d, $237.15; on the 23d, $232.79; on the 24th, $268.10; on the 26th, $172.32; on the 27th, $46.00, and $27.50; on the 29th, $3.15.

At the time of the receipt of this draft by the Bank of Bandon, December 15, 1913, there was an overdraft of $175.02 in the account of the Alfred Johnson Lumber Company with the Bank of Bandon, and from the 15th to the 29th of December, 1913, there

(Testimony of L. E. Gallier.)

was paid out by the Bank of Bandon to the Alfred Johnson Lumber Company $5,710.55. This last-mentioned sum does not include the overdraft.

Cross-examination.

When this draft of $6,000 was deposited on the 15th of [45] December, 1913, with the Bank of Bandon, a credit was entered to the account of the Alfred Johnson Lumber Company of $5,905.00, and the other $95 of the draft was the amount of exchange and discount. The overdraft was $175.02.

This ledger page of the account which I have before me of the Alfred Johnson Lumber Company with the Bank of Bandon does not show any other indebtedness than this commercial banking account.

There was no other indebtedness from the Alfred Johnson Lumber Company to the Bank of Bandon from the 15th to the 29th of December, 1913, than this $175.02 overdraft that I know of. I think there were no notes of the Alfred Johnson Lumber Company held by the Bank of Bandon. I did not personally have any financial statement which had been handed to the Bank of Bandon by the Alfred Johnson Lumber Company about December 15, 1913, or sixty days prior to that time. Mr. Fahy or Mr. Kronenberg might have had; I have none such in my custody.

The amounts paid by the Bank of Bandon for the account of the Alfred Johnson Lumber Company between the 15th and 19th days of December, 1913, were as follows: On the 15th, $253.07; on the 16th, $1,890.70; on the 17th, $575.68, and also $288.87; on

(Testimony of L. E. Gallier.)

the 18th, $952.87, and on the 19th, $326.17. That makes a total of $4,287.36; that is, from and including the 15th to and including the 19th of December, 1913.

[Testimony of George P. Topping, for Plaintiff.]

GEORGE P. TOPPING, called and sworn as a witness on behalf of the plaintiff, testified in substance as follows:

I reside at Bandon, Oregon. I am an attorney at law, and am and have been since the organization of the Bank of Bandon its attorney. I am the George P. Topping referred to in the telegrams and letters introduced in evidence here. [46]

When the telegram of the 29th of December, 1913, was received by the Bank of Bandon, informing that bank that this draft had been dishonored, the matter was at once referred to me by Mr. Fahy, the cashier, and a consultation followed, and Mr. Fahy and myself prepared the telegram which was sent in answer. In reference to investigating as to whether there was any property of the Alfred Johnson Lumber Company to attach, I proceeded at once to examine the county records to find the standing of the Alfred Johnson Lumber Company to see what their liabilities were and whether there were any liens against their property. I also made a special trip to investigate the condition of the available assets on the wharf, the mill—anything that I could find. The matter was left in my charge, and I immediately proceeded to satisfy myself as to whether there was anything we could recover. From that investigation I

(Testimony of George P. Topping.)

found that there were mortgage liens against their mill and property. I found one mortgage to Tom Rushbaker of approximately $10,000 on the mill property. That is the only property that I found that they had which anything could be made out of by attachment; and I think a man by the name of Wheeler had some lien; I have forgotten, though, just what the particulars of that were and the nature of that and the amount, because, after satisfying myself as to the advisability of trying to protect ourselves that way, I did not charge my mind further with it. There was in the neighborhood of 500,000 feet of common fir or pine, and there were labor liens on some of that and there were other liens—labor was threatening at that time, by the 29th, to place other liens, and their time had not expired; so if they had filed their liens, they would have been prior to the attachment. Taking into consideration those prior liens and the transportation of the lumber, there would not have been enough left to justify getting out the papers. I am not prepared to give anything but a very approximate [47] opinion as to the value of the mill property. I am not much of a judge of mill property. As I said, the information I took as to its value at that time I put out of my mind, other business coming up for my consideration.

Cross-examination.

The Alfred Johnson Lumber Company had the only sawmill there. I did not estimate the number of acres, except as it is shown from the records. I

(Testimony of George P. Topping.)

can't recall now how many acres the records did show. My recollection is it covered all of the mill property and some land beside that. I should judge there is possibly between five and ten acres covered by the mill and the yards.

I cannot recall the date of the mortgage. It is not a mortgage executed in the interim between December 15th and December 29th, 1913. It was one quite a while prior to that. I could not give you the value of the property covered by that mortgage. I satisfied myself of this fact—that if we attached we would have to take up this mortgage lien; the bank would be investing in an unprofitable mill property. As to giving you an idea as to what I discovered as the value of that property which I say was mortgaged for approximately $10,000, I would not give you more than $20,000 for the whole thing. I think it was not worth over $15,000 or $20,000. With all the claims I found against it, I would not—I have no knowledge; I cannot give you an opinion as to its value.

As to my giving an opinion as to the advisability of attaching or not attaching, I gathered my information as to values from those who knew. I could not give you the figures of that information which I obtained, but I know that it was sufficient to satisfy myself that an attachment would be useless. I do think that property was worth $15,000. I don't recall any other property [48] that I found belonging to the Alfred Johnson Lumber Company. I found no standing timber on any lands except equi-

(Testimony of George P. Topping.)

ties, which were not attachable. They had contracts, I think, for stumpage and things like that. My recollection is that they were not available. I could not say now why they were not available; it has been some time ago.

I did not know that this particular subject was coming up at all. I was the attorney for the bank all this time, and carried on a part of this correspondence with the defendant, American National Bank, under consultation with the other officers.

I cannot tell you of any other property that I found, not sufficient to swear to it. This other property that I spoke of was not acreage. It was the right to remove timber and pay stumpage on it—contracts for timber, if I remember right. I could not say how large an amount they were. I think Mr. Kronenberg could testify in regard to that; I think Mr. Kronenberg knows about that. I think at that time I did—that is approximately—get an estimate in dollars and cents as to the values of those equities. I would not want to swear to it approximately, because—it would be a rough guess. I satisfied myself it was not worth levying upon; it would be of no value, and we would derive nothing from it by attachment. Yes, I was the one that was delegated by this bank, the plaintiff, to investigate that feature of it. I cannot give you any idea in a general way either as to the value of those equities. Perhaps if I would explain, some of the information as to those values came from others who knew, and I think partly from Mr. Kronenberg, who knew something

(Testimony of George P. Topping.)

of the value, and consultations followed, in which we satisfied ourselves that an attachment would not avail anything. We did not take abstract figures in detail. I am sorry that I cannot give you the information. If I had known I was going to be called upon to testify, I certainly could have [49] done it. I do not recall that I did find any other properties than these equities. There were a number of items; my recollection is that the mill property was the most important. It has been some time ago, so long ago that I would not undertake to testify intelligently with any degree of reliability as to the property—kind of property or the amount.

I cannot give you the total amount of the acreage that I found that stood in the name of the Alfred Johnson Lumber Company at that time. The acreage would be the smallest consideration. It generally runs in lots of 100 or 160 acres. It would probably run not over 160 acres in parcels. I cannot give you the totals, nor any idea of the totals. I did not bring any information along with me. I would not be willing to swear as to how many of these parcels of 80 or 160 acres stood in the Alfred Johnson Lumber Company name; I can give you no approximation. It ran in 80 or 160 acre tracts. It is not land that belonged to the Alfred Johnson Lumber Company, as I recall it. It is land on which they had contracts; somebody else owned the land. They had contracts for the stumpage; they had no interest in it. That is no asset belonging to them, except as they take it iff. They had an equity in the stump-

(Testimony of George P. Topping.)

age upon that land, and I cannot tell the value of that in dollars and cents. There was no value in those equities that was attachable from the fact that it would require labor and much expense to put that timber in and make it available. It was not put in, and therefore not available. It might have been worth a million dollars, and yet it was not available so you could attach it. This 500,000 feet of common fir or pine lumber was on the mill dock. It ranged in value about $5—$4 or $5 a thousand, as I recall it. That would be somewhere between $2,000 and $2,500 for that. That was not attached, because there was the labor that would have to come out of it. I could not give you those figures. They were figured [50] out at that time; I have those in my record, and the stumpage was to come out of it; the transportation would have to come out of it. If we had attached it, the labor could have put liens on it. I think the labor liens were practically enough to consume the value entirely, adding freight to it. You cannot turn that into money without shipping it to San Francisco to market. The liens of labor upon that 500,000 feet would come close enough to have practically consumed it. The claims of the men who cut that lumber at that time would, with other liens, have amounted to as much as the value of the lumber.

The COURT.—I do not see the value of this sort of examination.

Mr. HUBBARD.—Your honor, it is material, we consider, for this purpose: We contend that this company cannot recover against us if we can show either

(Testimony of George P. Topping.)

of two sets of facts—either that they could have protected themselves by other property which was attachable, and that the company was solvent; or, on the other hand, if they had attempted to attach this particular cargo which came down to San Francisco, and which they contend they could have attached if we had notified them before the 29th. If we could show that the Johnson Company was insolvent, so that the attachment would have been nugatory upon either of these two horns of the dilemma, there is no liability upon this defendant. This testimony at this time is important upon the first of these propositions, namely, if we could show by this witneses—

The COURT.—I do not think you apprehend my suggestion. I said I did not see the value of the character of examination that you are indulging in, going over the same ground repeatedly with the witness, when he has shown you very clearly that he has not now in his mind these items that you are calling for. My experience as a practicing lawyer, as well as on the bench, is such as to show [51] me the perfect reasonableness of it is this, that he made an investigation at the time, at the instigation of his client, to ascertain whether or not there was a reasonable ground of expectation of realizing on this claim before an attachment was levied upon the property. Now, he made an investigation which satisfied himself at the time as an attorney that it would be futile, it would be fruitless; he has told you that repeatedly. Inasmuch as he has not retained in his mind since then the details of this, which he has told you time

(Testimony of George P. Topping.)

and time again, that is without having access again to the records in his office, the memoranda and its items that he took down at the time, assuming that he has ascertained them, what I am suggesting is that you will get nothing further by getting him to go over and repeat the same things that he has told you.

Mr. HUBBARD.—With all due respect to your Honor, we take the position that we are not precluded simply because the witness gets on the stand—

The COURT.—With all due respect, I limit the reasonable character of an examination, and I sit here for that purpose.

Mr. HUBBARD.—We understand that, your Honor, and we will, of course, submit to your ruling.

The COURT.—It is my practice to withhold the privilege of repeated questions of the same precise character to a witness that has shown in apparently good faith that he is not capable of answering. That is all my suggestion meant, that I did not see the value of the character of examination that was being indulged in. The subject matter of your examination I am not questioning the propriety of, that is, the object that you have in mind; but that is an entirely different question from repeatedly putting to a witness questions which he has already answered.

WITNESS.—(Continuing.) I do not know when these liens accrued on this particular cargo. I could

(Testimony of George P. Topping.)

not give the date, but they [52] were before—that is, they were available to the lien claimants at the time, before we could have made the attachment. In Oregon you have thirty days to file a labor lien of this nature, while the lumber is yet upon the dock. The man who furnishes the stumpage also has the same lien and loggers in the logging camp, also have the same lien, and they are prior to all other liens, attachments or otherwise, even though they have not asserted them, as long as they would file them within thirty days, and they would precede the attachment if the attachment I was levying was before the lien was filed—that is to protect the labor within that thirty days' grace. That cargo had not been on the dock very long, for less than thirty days, quite a little. I did not find any other property that was subject to attachment. I made a very thorough investigation, struggled very hard to grab something.

I do not know of anything that occurred between December 15th and December 29th, 1913, which brought about this condition of the Alfred Johnson Lumber Company. The refusal of the draft was the first revelation to us that anything was wrong at all. The Robert Dollar Company had refused them credit—I mean credit upon the draft. They refused to honor the paper, and that very materially affected their financial condition.

During this investigation which I made as to the financial status of the Alfred Johnson Lumber Company I found their condition about the condition of

(Testimony of George P. Topping.)

the average mill company, as near as I can recall. They had the usual amount of liabilities. The financial condition was very much the same as the average; they were simply running the mill upon the available timber that they had and turning it into money, and running the mill again on the money they got. I could not give an opinion as to its assets and liabilities without reference to a memorandum. I investigated to determine as to whether I should attach, from whether or not there was anything attachable. [53] The question of their financial condition would not enter into my investigation except as I discovered liens and claims prior to our right of attachment. I don't know whether it would have been nugatory or not to attach if in my investigation of the financial condition I ascertained that the Alfred Johnson Lumber Company was on the border of insolvency. I could not say as to that, nor do I think any other attorney ever could.

Q. You did not go into the question, then, as to whether if you had attached whether or not it would have been plunged into bankruptcy by other creditors?

A. That is a possibility, yes, at all times.

Q. This particular case, Mr. Topping, which we have discussed, was not that a possibility which confronted you?

Mr. PARTRIDGE.—If your Honor please, I object to that on the ground it is immaterial and incompetent, in that the defendant here cannot hide behind a mere possibility.

(Testimony of George P. Topping.)

The COURT.—That is a mere assumption, that because under the law a proceeding in bankruptcy supersedes attachments levied within a given time, that had the party been attacked and been thrown into bankruptcy, it would have avoided the attachment. It is argument rather than matter of examination. You can draw your deductions from the evidence; you can ask an instruction to the jury as to what the law would be, but it is not a proper subject matter to examine a witness upon.

Mr. HUBBARD.—Very well, your Honor.

The COURT.—Because it is asking him to state a conclusion.

Mr. HUBBARD.—That is all.

To which ruling of the Court the defendant duly excepted, and which ruling is herein designated as error No. 1. **[54]**

Redirect Examination.

My investigation proved that there were no*t* claims of any importance against this cargo of white cedar which was brought away by the "Grace Dollar" on the 24th of December, 1913. This pay-roll draft had taken them up; the $6,000 draft which was dishonored had taken them up.

[Testimony of J. L. Kronenberg, for Plaintiff (Recalled).]

J. L. KRONENBERG was recalled on behalf of the plaintiff and testified in substance as follows:

These stumpage contracts which the Alfred Johnson Lumber Company had were of very little, if any,

(Testimony of J. L. Kronenberg.)

value. They were stumpage contracts made three or four years ago when timber was more valuable than it was or is at this time, and it is a question whether a contract could be made for stumpage at that price. A stumpage contract is an agreement to pay a certain rate of stumpage for the timber taken from parties' lands—that is, they had a right to cut timber from other people's land and pay them a certain price per thousand, and the stumpage was paid upon the delivery of the logs at the mill.

The COURT.—Q. Were the contracts made at a rate of stumpage which would not produce values at this port by reason of the difference in prices among them?

A. That is a question whether they would be as valuable now as they were then.

The COURT.—Q. $1 a thousand or $1.25?

A. $2.25 for fir and $5 for white cedar.

The COURT.—Q. That is a very high rate of stumpage, isn't it?

A. Yes.

Mr. PARTRIDGE.—Q. You could get contracts for stumpage at less than that now?

A. I think so. [55]

Cross-examination.

Between December 15th and December 29th, 1913, I could not say positively whether I could get contracts for stumpage less than that, but I think you could get them just as cheap and probably cheaper.

Mr. HUBBARD.—Q. You say you placed no value

(Testimony of J. L. Kronenberg.)

upon those stumpage contracts?

A. I would not consider them of any attachable value.

The COURT.—That is what I understood the witness to mean—that is, value for attaching purposes because of the necessity of the labor required to make them available.

WITNESS.—(Continuing.) It would be a very hard question to answer as to whether I had any opinion or idea of my own as to the value of this property which was covered by this mortgage of $10,000, for the reason that the mill is old and in very bad shape. It did possibly have a value above the $10,000 mortgage. I could only give you my personal opinion as to how much above that mortgage; it might be $2,000 to $5,000 above. We knew nothing out of the ordinary happening between the 15th of December and the 29th of December, 1913, in the affairs of the Alfred Johnson Lumber Company that so altered its position that we would have attached had we known before the 29th that this draft was not going to be accepted.

Here the following proceedings were had:

Mr. PARTRIDGE.—Now, if your Honor please, I request permission to amend the complaint to conform to the proof. I find that the allegations of the complaint are to the effect that the $4500 was paid out by the Bank of Bandon subsequent to the receipt of the notice. I want to amend to set up the true fact as shown by the evidence, to the effect that the

(Testimony of J. L. Kronenberg.)

money was paid out beginning on the 15th and the amount was paid up to the 19th, and the amount was paid afterwards. [56]

Mr. HUBBARD.—What about the second cause of action?

Mr. PARTRIDGE.—The second cause of action I have eliminated entirely by putting it all in one.

Mr. HUBBARD.—May we see your proposed amendment?

Mr. PARTRIDGE.—Yes. Any objection to that, Mr. Hubbard?

Mr. HUBBARD.—No objection, provided, of course, it may be considered—we have to prepare our answer now—that our general denial which is already on file may apply to this pleading as amended.

The COURT.—This is unverified?

Mr. PARTRIDGE.—Yes.

The COURT.—Your general answer may be regarded as applying to this.

[Testimony of George P. Topping, for Plaintiff (Recalled).]

GEORGE P. TOPPING, a witness on behalf of the plaintiff, was recalled by the plaintiff and testified in substance as follows:

The nature of those other claims or liens against the mill property were machinery contracts in addition to the mortgage; for instance, some of this machinery purchased by the Alfred Johnson Lumber Company was purchased under contract, in which

(Testimony of George P. Topping.)

they held no title until the machinery was paid for, and there were towage liens.

Cross-examination.

I mean that these machines were purchased by the Alfred Johnson Lumber Company on conditional sale contracts and never paid for. I am in the same condition as to those as I am in regard to the other matters as to knowing how much these amounted to, except that they ran into several thousand dollars. My recollection is that this mortgage did not cover these machines, because the Alfred Johnson Lumber Company had no title which they could hypothecate. **[57]** The mortgage was in addition to that. A man by the name of Ashton had a towage claim, which I satisfied myself, which would be a lien prior to our attachment, for something like $1,200. It is my understanding that this lien was upon this specific cargo of 500,000 feet. Of course these figures I could not give specifically.

Here the plaintiff rested.

[Testimony of R. Stanley Dollar, for Defendant.]

R. STANLEY DOLLAR, a witness called and sworn on behalf of the defendant, testified in substance as follows:

I reside in San Francisco. I am vice-president of the Robert Dollar Company, and have been such a good many years, and was such during December, 1913. The Robert Dollar Company has had dealings with the Alfred Johnson Lumber Company ever since the Alfred Johnson Lumber Company was

(Testimony of R. Stanley Dollar.)

formed, which was about two years ago.

Between December 15th and December 29th, 1913, there was a business transaction between the Alfred Johnson Lumber Company and the Robert Dollar Company. We were handling the output of the Alfred Johnson Lumber Company. We were advancing money to the Alfred Johnson Lumber Company up to that date.

Q. How did the affairs stand at that date—between those two dates, between December 15th and December 29th?

Objected to by the plaintiff as immaterial, irrelevant and incompetent, particularly incompetent in that a third party, that is the agent, the collecting agent bank, holding papers for collection cannot protect itself by taking refuge behind the fact that the drawee of a bill of exchange does not hold funds of the drawer.

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and which ruling is herein designated [58] as error No. 2.

WITNESS.—(Continuing.) Between December 15th and December 29th, 1913, the status of the financial affairs between the Robert Dollar Company and the Alfred Johnson Lumber Company was that it owed the Robert Dollar Company about $97,000, for which there was no security. From about the 29th of December, 1913, up to about the middle of January, 1914, I had occasion to go minutely into the financial affairs of the Alfred Johnson Lumber Company. I went up to Bandon to look over their books

(Testimony of R. Stanley Dollar.)

to see how they stood. I was up at Bandon on that mission a month. During that month I went through the books of the Alfred Johnson Lumber Company to ascertain the status of the financial affairs of that company.

Q. Now, from that going through the books what did you ascertain as to the general financial status of the Alfred Johnson Lumber Company as to solvency or insolvency?

Objected to by the plaintiff as immaterial, irrelevant and incompetent and hearsay, not the best evidence, and calling for the conclusion of the witness.

Mr. HUBBARD.—As it appeared subsequent to the 15th day of December, 1913?

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and which is herein designated as error No. 3.

WITNESS.—(Continuing.) When I went to Bandon I examined the cash-book, the ledger, journal and the bank-book of the Alfred Johnson Lumber Company. Its ledger is now in court. This book which I now have is the ledger of the Alfred Johnson Lumber Company. That ledger runs from 1913. It covers the period from December 15th on through up to January 1st, 1914. That is the book that I made an examination of. From that book I ascertained that the Alfred Johnson Lumber Company was insolvent. **[59]**

Q. Mr. Dollar, what position in reference to the affairs of the Alfred Johnson Lumber Company

(Testimony of R. Stanley Dollar.)

would the Robert Dollar Company have taken had it known that this particular cargo of cedar had been attached or was about to be attached by the Bank of Bandon?

Objected to by the plaintiff as irrelevant and incompetent.

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 4.

The COURT.—What one would testify now in the light of circumstances that have since developed they would have done on a particular occasion is entirely too uncertain, because they might not have been governed by the same considerations at the time at all.

WITNESS.—(Continuing.) After my visit to Bandon and my investigation of the affairs of the Alfred Johnson Lumber Company, the Robert Dollar Company, toward protecting its claim, got a list of all the creditors of the Alfred Johnson Lumber Company and asked them to join in on a trust agreement so as to keep any one creditor or two or three creditors from interfering, to see if we could work the thing out of the hole. That was done. That arrangement is in force now.

Q. What was that arrangement?

Objected to by the plaintiff as not the best evidence.

Which objection was by the Court sustained, to which ruling the defendant duly excepted, and

(Testimony of R. Stanley Dollar.)

which ruling is herein designated as error No. 5.

WITNESS.—(Continuing.) I was a party to the arrangement. It was reduced to writing. I have a copy of that trust agreement. [60]

Cross-examination.

Prior to the time that this draft of December 15th was presented to the Robert Dollar Company we had frequently cashed drafts from the Bank of Bandon given it by the Alfred Johnson Lumber Company. On this particular occasion we did not tell the Alfred Johnson Lumber Company to draw this draft and it would be honored.

That particular cargo of white cedar was sold here by our company; we got the money for it. I don't remember the date it arrived here; we have records showing all that. I could not say whether this cargo arrived here and was disposed of before the 29th of December, 1913. I think the boat sailed about the 24th from the mill, according to the testimony here, and it would take her about thirty-six hours to come down; so that she would be here to start to discharge on the 26th, and undoubtedly she would have been discharged, under ordinary conditions, on the 28th or 29th of the month. I don't remember when the cargo was sold here. Generally these cargoes are sold before they arrive. The money was credited by the Robert Dollar Company to the Alfred Johnson Lumber Company.

Redirect Examination.

That agreement about which I testified on my di-

(Testimony of R. Stanley Dollar.)

rect examination was signed by the Robert Dollar Company and signed by the other creditors of the Alfred Johnson Lumber Company. There are two agreements; that is, there are duplicate agreements, or rather a separate one was made for the creditors out of town and one for the creditors in town, but the wording of them was identical, covering the whole affairs of the Johnson Company, and every creditor signed it. I will send up the agreement as soon as I return to my office. **[61]**

[Testimony of J. L. Kronenberg, for Defendant (Recalled).]

J. L. KRONENBERG was recalled by the defendant and testified in substance as follows:

The agreement which you are showing me, purporting to be dated January 14th, 1914, between the Alfred Johnson Lumber Company on the one hand, and Robert Dollar, named as trustee, and other persons, companies and firms as creditors of the Alfred Johnson Lumber Company, has the signature on it of the Bank of Bandon and was executed by the Bank of Bandon.

Defendant offered the said instrument in evidence. The same was admitted, marked Defendant's Exhibit "A," and is in the words and figures following:

[Defendant's Exhibit "A"—Agreement, January 14, 1914, Alfred Johnson Lumber Co. and Robert Dollar, etc.].

1. THIS INDENTURE, made the 14th day of January, 1914, between Alfred Johnson Lumber Co.,

a corporation of Coquille, Oregon, hereinafter called the debtor, of the first part; and Robert Dollar of San Francisco, Calif., hereinafter called the trustee, of the second part; and the several persons, companies and firms whose names and seals are hereunder signed and affixed respectively, being creditors of the said debtor, and all other creditors of the said debtor acceding hereto, hereinafter called the creditors, of the third part, witnesseth:

2. Whereas the said debtor is indebted to the said creditors in the several sums set opposite to their respective names in the first schedule hereunder written;

3. And whereas the said debtor has agreed to make the assignment and enter into the covenants hereinafter contained, and the said creditors have agreed with the said debtor, and mutually each with the others, to accept these presents in satisfaction of their debts, and to execute the release hereinafter contained:

4. Now this indenture witnesseth that, in pursuance of the said agreements and in consideration of the premises, and **[62]** one dollar to it in hand paid, the receipt whereof is hereby acknowledged, the said debtor hereby conveys and assigns unto the said trustee, his heirs, executors, and administrators, all and singular the real and personal property, credits and effects of the said debtor to which it is beneficially entitled, whether in possession, reversion, remainder, or expectancy, except such parts thereof as are specified in the second schedule hereto.

5. To hold the same unto and to the use of the said trustee, his heirs, executors, and administrators, according to the respective nature and tenor thereof upon the trusts and subject to the provisions and agreements hereinafter declared concerning the same respectively.

6. And this indenture further witnesseth that, in pursuance of the said agreements, and in consideration of the premises, the said debtor hereby appoints the said trustee, or successor in interest or his attorney, for the purposes hereinafter expressed.

7. And the said debtor hereby ratifies and confirms and covenants with the said trustee that it will, if and when required by it, ratify and confirm whatsoever the said trustee shall do or purport to do by virtue of the said power. And the said debtor further covenants with the trustee that it will not, without the consent of the trustee, sell, dispose of, charge, or incumber the said premises hereinbefore subjected to such power, or any part thereof.

8. And it is hereby agreed and declared that the said trustee shall stand possessed of the hereditaments and premises hereinbefore conveyed upon trust at such time and in such manner as he shall think fit to call in, collect, compel payment of, and receive such parts of the said premises as are outstanding, and to sell and convert into money such parts thereof as do not consist **[63]** of money; and shall stand possessed of the net proceeds of sale (subject to the payment thereout of such sums, if any, as may be due to incumbrancers concurring in

such sales respectively), and of all other moneys which shall come to his hands under and by virtue of the trusts or powers herein contained.

9. Upon trust, in the first place, to pay and retain thereout all costs, charges, and expenses of or incidental to the negotiation, preparation, and execution of these presents, and of or to the carrying of the same into effect.

10. And, in the next place, to pay all claims which are by law entitled to be paid in full in priority to other debts in case of bankruptcy or insolvency by proceedings in court.

11. And to pay, divide, and distribute the residue of the said moneys ratably unto and among the said creditors in discharge of their said debts by such installments and at such times as the trustee shall think fit, and to pay the surplus, if any, to the said debtor.

12. Provided always, and it is expressly agreed and declared, that notwithstanding the said trust for sale hereinbefore contained, it shall be lawful for the trustee to postpone the sale and collection of any part of the said premises for such time as is consistent with reducing the same to money as soon as this can be wisely and prudently done.

13. And in the meantime, and until the said premises respectively shall have been called in, collected, sold, and converted into money as aforesaid, it shall be lawful for the trustee at his discretion to manage, employ, repair, and insure against damage or loss by fire or otherwise, at the cost of the trust estate, all or any part of the said premises.

14. And it shall be lawful for the trustee to carry on the business which the said debtor has hitherto carried on, and [64] for such last-mentioned purpose to make such advances out of the premises for the time being, subject to the trusts of these presents, as he shall think fit.

15. And it is hereby agreed and declared that the said creditors shall be entitled to receive dividends under these presents in respect of all debts due to them respectively which would have been provable in bankruptcy, and on the amounts for which they would have been so provable.

16. And this indenture further witnesseth that, in further pursuance of the said agreements, and in consideration of the premises, the said creditors respectively hereby release the said debtor from the said debts, and from all other debts, if any, owing from the said debtor to them respectively, in respect whereof they would be entitled to receive dividends under these presents, and from all actions, claims, and demands whatsoever (other than their respective rights under these presents) in respect thereof.

17. Provided always, and it is hereby agreed and declared, that these presents shall not in any way prejudice or affect the rights or remedies of the said creditors against any surety or sureties, or any person or persons other than the said debtor. Nor shall these presents in any wise prejudice or affect any security which any of the said creditors may have or claim for his debt. But, nevertheless, if such security shall be enforceable against the said

debtor or his effects, then and in that case such creditor (unless he shall consent to abandon his said security) shall be entitled to receive dividends hereunder upon so much only of the said secured debt as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof.

18. And it is also declared that the power of appointing [65] new trustees shall, for the purposes of these presents, be vested in the said creditors, representing in value more than a moiety of the debts ranking for dividend hereunder.

19. And the party of the first part hereby covenants with the said party of the second part from time to time and at all times when requested to execute and deliver all such instruments that said party of the second part shall deem necessary or require in order to carry in full effect the true intent and meaning of these presents, and does hereby constitute and appoint the party of the second part its attorney irrevocable and with power of substitution, authorizing him in the name of the party of the first part or otherwise, as the case may require, to do any and all acts, matters and things to carry into effect the true intent and meaning of these presents which the party of the first part might do if personally present.

20. Unless all creditors sign, the arrangement as proposed cannot be carried into effect and shall be considered null and void.

In Witness Whereof, the party of the first part has

caused these presents to be executed by E. E. Johnson, Vice-president, duly authorized thereto by resolution of its board of directors duly and regularly passed, and the said party of the second part has hereunto set his name, and the parties of the third part have hereunto set their names together with the amounts of their respective claims set opposite thereto this 14th day of January, A. D. 1914.

ALFRED JOHNSON LUMBER CO.
By E. E. JOHNSON,
Vice-president.

Executed in the presence of us as witnesses for party of the first part.

A. J. SHERWOOD.
W. KUCHLER.

ROBERT DOLLAR,
By R. STANLEY DOLLAR,
His Attorney in Fact. [66]

Name of Creditor.	Amount of Claim.
The Robert Dollar Co. By R. Stanley Dollar, Vice-pres.	95,359.46
First National Bank of Coquille	5,000.00
Farmers & Merchants' Bank of Coquille	2,500.00
R. W. Beelard	493.84
Bandon Iron Works	1,394.01
T. P. Hanly	405.93
C. R. Gabeler	265.14
Bandon Market	395.15
Bank of Bandon	5,000.00
A. B. Daly & Co.	217.28
Nelson Iron Works, by J. S. Lyons	334.84
Coquille Valley Creamery Co.	450.60

Name of Creditor.	Amount of Claim.
McNair Hdw. Co.	249.28
Bank of Bandon as their interest may appear	6,000.00
C. W. Ashton	923.50
O. R. Willard, Pres. of C. R. T. Co.	
R. H. Most, Secty. " "	
Coos Bay Home Tele. Co.	
By W. U. Douglas, Pres.	168.80
Johnson Lumber Co., by E. E. Johnson Sec.	13,930.42
Q. P. Bartlett	10,000.00
By S. P. Bartlett	
Maryland Casualty Co.	
By Rodgers Hart Gibson Co., Gl. Agts.	346.65
C. McC. Johnson, by E. E. J. (Except Jan. and Feb. Salary)	
Macomber & White	
Swift and Company	
The American National Bank of San Francisco, by D. B. Fuller Cashier (As its interests may [67] appear a-c draft for $6,000, referred to above by Bk. of Bandon)	6,000.00
The Gutta Percha Rubber Mfg. Co., H. P. Martine, Mgr.	248.46
T. P. Degan Belting Co., W. P. Beard	130.56
Sperry Flour Co., per W. P. Lugg	326.22
Berger and Caster Co., A. N. Hanson	542.49
Haas Brothers, Baueram	269.55
California Saw Works, H. Bird	173.50
American Marine Paint Co.	122.88

Name of Creditor.	Amount of Claim.
Remington Typewriter Co., H. J. Hastings..	1.57
H. L. Judell & Co., H. L. J.....	6.00
Plant Rubber & Supply Co., E. H. Purie, Secy.	56.52
Mason Ehrman & Co.....	30.90
Feb. 9, 1912, W. P. Fuller, H. H. S.....	584.78
Dunham, Carrigan & Hayden Co., W. M. Lengisiler, Secy.....	17.50
Western Meat Co., G. J. Johst.....	21.15
Balfour Guthrie & Co.....	9.07
Simmons Manufacturing Co., Jno. M. Sears, Mgr.....	984.53
Albers Bros. Mill Co.....	23.16
G. W. Brainard	
Carson Glove Co.....	21.71
Davis Scott Belting Co.....	32.34
By G. W. Brainard	
The J. K. Gill Co.....	12.23
L. Dinkelspiel Co.....	33.93
Standard Oil Co.....	12.24
Neustadter Bros.	131.20
By H. L. Smith	
Tillmann & Bendel	22.40
Baker Valve Co.....	10.00
Pacific Lumber Inspection Bureau, Inc....	60.26
By Jno. W. Alexander, Secty. [68]	
Northwestern Mutual Fire Association M. D. L. Rhodes, Secy.....	75.00
The Timberman, by G. W. Brainard.....	40.00

HERE THE DEFENDANT RESTED.

[Testimony of Frank P. Doe, for Plaintiff (in Rebuttal).]

FRANK P. DOE, a witness called by the plaintiff in rebuttal, was sworn and testified in substance as follows:

I reside in San Francisco. I know the Coquille Mill & Towboat Company. I am the president of that company, and also acting as San Francisco agent. That company owns timber lands in the neighborhood of Bandon, Oregon. It is a timber land which is included in the stumpage contract to the Alfred Johnson Lumber Company.

The book which you are now showing me is the cash-book of Frank P. Doe, in which we make entries of the actual payments. It is kept not entirely by myself. The item on the page opened here, the item of January 28, 1914, is in my handwriting.

Q. Now, Mr. Doe, refreshing your memory from that in your own handwriting, will you state whether or not you received any money from the Alfred Johnson Lumber Company on the 28th of January, 1914.

Objected to by the defendant as immaterial, irrelevant and incompetent.

The COURT.—The contention is here, as I understand on your part, they were insolvent and unable to pay their debts at that time.

Mr. HUBBARD.—That is in January, 1914.

The COURT.—That is after this transaction in suit, isn't it? **[69]**

(Testimony of Frank P. Doe.)

Mr. HUBBARD.—Yes.

The COURT.—What is the theory upon which you offer this?

Mr. PARTRIDGE.—On the theory that it tends to show that the Robert Dollar Company would not have thrown them into bankruptcy.

The COURT.—There is no evidence that they were thrown into bankruptcy.

Mr. PARTRIDGE.—No, but the theory of counsel, as I understand it and its sole and only defense, is that, although they made this mistake, it was of no difference, because if we had attached they would have thrown them into bankruptcy; I offer this as evidence tending to show they would not have done anything of the kind, and as a matter of fact they protected them up to the end of January.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 6.

A. Yes, we did.

Q. How much?

Objected to by the defendant as immaterial, irrelevant and incompetent.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 7.

A. $269.40.

Q. What was that for?

Objected to by the defendant as incompetent, irrelevant and immaterial.

(Testimony of Frank P. Doe.)

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 8.

A. That was for logs sold prior to the first of January. **[70]**

WITNESS.—(Continuing.) That is stumpage, I mean.

Q. Now, then, in what way was that amount paid to you?

Objected to by the defendant as irrelevant, incompetent and immaterial.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 9.

A. By the Robert Dollar Company.

Q. By a draft on them from the Alfred Johnson Lumber Company, you mean?

Objected to by the defendant as irrelevant, incompetent and immaterial.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 10.

A. No. As I recollect, this amount was due, and they sent us out their check for it.

The COURT.—Q. Who sent you the check?

A. The Robert Dollar Company.

The COURT.—Q. But it was for the debt of the Alfred Johnson Lumber Company? A. Yes.

Cross-examination.

This payment was for logs or stumpage that was

(Testimony of Frank P. Doe.)

sold in November or December, 1913, as I recollect—October and November, I mean. As to when these logs were actually taken by the Alfred Johnson Lumber Company I only know from the entries made by our company at that time. As I recollect, it was October and November, 1913. Of course our company had a lien upon those specific logs by virtue of our contracts.

The COURT.—Q You had perhaps a right under the statute to a lien?

A. Yes. **[71]**

The COURT.—Q. Within a given time?

A. Yes. Mr. Kronenberg is the manager up there, and he managed that end, and he could tell you better than I.

[Testimony of S. P. Bartlett, for Plaintiff (in Rebuttal).]

S. P. BARTLETT, a witness called in rebuttal by the plaintiff, was duly sworn and testified in substance as follows:

I have been living about thirty miles east of Portland up to a couple of weeks ago. I was connected with the Alfred Johnson Lumber Company as secretary and treasurer, and was such in the month of December, 1913.

I don't remember any particular draft drawn by the Alfred Johnson Lumber Company on the Robert Dollar Company of San Francisco. They were drawing drafts right along.

Q. In December—that is, on the 15th of December,

(Testimony of S. P. Bartlett.)

1913, when the draft was drawn for that month's pay-roll—did you have any knowledge or any reason to believe that that draft would not be honored by the Dollar Company?

Objected to by the defendant as immaterial, irrelevant and incompetent and not rebuttal.

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 11.

The COURT.—Q. Did you have any information or knowledge in December, 1913—that is, at the time this draft was drawn—that that draft would not be honored when it was received here in San Francisco?

A. No.

[Testimony of George P. Topping, for Plaintiff (in Rebuttal).]

GEORGE P. TOPPING, a witness called by the plaintiff in rebuttal, testified in substance as follows:

Q. Mr. Topping, do you know whether or not that mortgage **[72]** that was on the mill and property of the Alfred Johnson Lumber Company was foreclosed?

Objected to by the defendant as immaterial, irrelevant and incompetent and not rebuttal.

Mr. PARTRIDGE.—I think if it is not strictly rebuttal, it is competent evidence.

The COURT.—What is the theory?

Mr. PARTRIDGE.—The theory is, I want to show that the mortgage was foreclosed and how much the property was sold for.

(Testimony of George P. Topping.)

Which objection was by the Court overruled, to which ruling the defendant duly excepted, and which ruling is herein designated as error No. 12.

A. Yes, I do know. It has been foreclosed and the property sold. I could not give the exact date of the sale, but I think some time during the latter part of August or first of September, 1915. It was sold for approximately $9,400; that is, it was sold for less than the face of the mortgage.

Here the plaintiff rested.

The foregoing constitutes all of the testimony adduced upon the trial of said cause.

Thereupon counsel for the respective parties argued said cause to the jury, at the conclusion of which the Court instructed the jury as follows:

[Instructions of Court to Jury.]

"Gentlemen of the jury, you are perhaps sufficiently aware of the nature of this action at this time. It is an action by the plaintiff to recover by reason of the alleged negligent failure of the defendant to notify the plaintiff of the dishonor of [73] a draft which had been drawn upon the Robert Dollar Company and which, when presented to that company, it appears, was dishonored. Under the principles that I shall state to you, the case is a very simple one. It simply depends upon whether or not, by reason of the act of the defendant, about which there is no controversy under the evidence, the plaintiff lost the money for which suit is being prosecuted, or whether, by reason of the circumstances, the act

of the defendant in nowise contributed to that loss, but that the plaintiff would have lost the money nevertheless.

"A bank undertaking the collection of a foreign draft—and this was what is known as a foreign draft—must use reasonable and due diligence to protect the owner of the draft by taking all such steps by presentment, demand, protest and notice as are necessary to fix the liability of all parties to whom the owner has the right to resort for payment. The collecting bank is bound to present the draft to the drawee at once, and if the drawee does not accept it, then the bank is bound to immediately notify the payee and drawer, and if the bank does not do so it is liable for all damages caused by its failure so to do, that is, all damages proximately flowing from its failure, the measure of damages being the amount of money actually paid out, together with interest.

"The instrument involved in this action is a foreign draft or bill of exchange, and notice of the dishonor of such an instrument can be given only by notice of protest, which must be noted on the day of presentment or the next business day.

"A draft is dishonored when it is either not paid or not accepted on presentment for the purpose. Notice of the dishonor of a draft when given by mail must be deposited in the postoffice in time for the first mail which closes after noon of the first business day succeeding the dishonor and which leaves the place where the instrument was dishonored for the place to which the notice should be sent. All of

these are code provisions. [74]

"If you find that a usage existed between the parties from their course of dealing whereby plaintiff, in the ordinary course of business, advanced money to the Alfred Johnson Lumber Company immediately upon the latter drawing a draft in favor of the former, and that because of this usage there was an implied agreement between the plaintiff and defendant under which defendant was to notify plaintiff by telegraph immediately upon the nonacceptance or dishonor of any such draft exceeding five hundred dollars in amount; and if you further find that through defendant's negligence plaintiff was not so notified by telegraph or in any other manner promptly of the nonacceptance of the draft involved in this case, and that solely because of such negligence of defendant, plaintiff became unable to collect the money advanced on said draft in accordance with such usage, then defendant would be liable for all money advanced by plaintiff on said draft to the drawer, even though advanced before the draft had been received by the defendant for collection.

"If prompt notice of the dishonor of a bill of exchange or draft is not given to the drawer, then it is exonerated—that is, the drawer—from all liability on the draft. It would therefore make no difference, under such circumstances, whether the drawer was insolvent or not, because it would not be required to make good the amount.

"The burden of proof is upon the plaintiff to show by a preponderance of evidence the facts upon which

it relies for recovery, the amount of money that it advanced on the draft to the drawer, and to show that its failure to collect that money was directly and proximately caused by the act or omission of the defendant alleged in the complaint.

"If, therefore, you find that the plaintiff, after having been actually notified of the nonacceptance by defendant, even [75] though such notice was not promptly given, could by reasonable effort have collected from the drawer the amount of money advanced to the latter, then plaintiff would not be entitled to recover. If it could not have so recouped itself, then the defendant is liable for the loss. It was only bound to use such reasonable diligence as a business man of ordinary prudence would have used under like circumstances. You will understand, therefore, that before you can find for the plaintiff it must appear that defendant's action, in view of the course of dealing between the parties, caused the plaintiff to change its position toward the drawer of the draft, and by such act plaintiff either gave credit to the drawer that it might otherwise not have given, or refrained from taking legal proceedings to protect itself for the advances made by it to the drawer.

"Now, on the subject of the insolvent condition of the parties which has been, to some extent, argued before you, I advise you thus: A person or corporation is insolvent whenever the aggregate of his or its property, exclusive of any property which he or it may have conveyed, transferred, concealed or removed, or permitted to, be concealed or removed,

with intent to defraud, hinder or delay his or its creditors, shall not, at a fair valuation, be sufficient in amount to pay his or its debts.

"The lien of an attachment obtained by any creditor upon any property of a debtor is dissolved by the adjudication of bankruptcy of a person or corporation whose property is so attached within four months before the filing of bankruptcy proceedings, either against such person or corporation by the creditors or by the person or corporation themselves, if such lien of the attachment was obtained and permitted while the person or corporation was insolvent, and that the existence and enforcement of such lien of attachment will work a preference or the creditor so attaching had [76] reasonable cause to believe the person or corporation debtor was insolvent and in contemplation of bankruptcy at the time of such attachment. I state to you this latter principle, because of the contentions put forth by the defendant here.

"You are to determine, under all the circumstances that have been submitted to you here, and from all the evidence in the case, what the real situation was in reference to this transaction. It does not appear here in any direct, positive way that the Johnson Lumber Company was insolvent within the definition which I have given you from the bankruptcy act. There is evidence here, however, from which the jury would be at liberty to so infer.

"There was testimony given by Mr. Stanley Dollar on the witness stand that he examined the books of

the Johnson Lumber Company, and he said it was in an insolvent condition. Now, of course, that evidence is not evidence of insolvency—I mean such evidence does not of itself necessarily establish insolvency. Insolvency is a legal status, and it is the result of the existence of the conditions which the bankruptcy act has given as constituting insolvency, and which I have read to you. And a witness merely saying that a party is insolvent is therefore stating a mere conclusion; and you will understand that you are not bound from the testimony of that witness alone to determine that the Johnson Lumber Company was insolvent at the time. You have a right to consider the facts which the witness stated, though, independently of that conclusion, together with all of the other evidence in the case in determining whether it was solvent.

"The question of the insolvency of the Johnson Lumber Company, and its financial ability to meet its obligations, is only material in this case as bearing upon the question whether or not, had the plaintiff in this case been afforded an opportunity to attach that property, such attachment would have availed to [77] secure a liquidation of their debt, the theory of the defendant being that if they had notified them in time to levy such an attachment, that the interposition of bankruptcy proceedings would have negatived the value of any such attachment. It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man may be in shaky circumstances, that because he may actually be in insolvent

circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor's claim without actually putting him into insolvency; but, nevertheless, you have a right, under all the evidence that has been submitted to you, to determine what would have been the probable effect of the levying of the attachment for the claim of plaintiff which is here sued upon, had they been notified in time of the dishonor of this draft.

"As I suggested at the beginning, the liability of the defendant for this obligation growing out of its tort—because negligence under such conditions gives rise to a tortious demand—depends upon the question whether the plaintiff's loss arose through that act, or whether it would have suffered the loss independently of that act—whether, in the event that the defendant had strictly and in accordance with its legal obligations, given a notice promptly and had the draft protested, it would have availed the plaintiff, and it could have saved itself by proper proceedings. If it would, the plaintiff is undoubtedly, under the facts before you, entitled to recover, because as to those facts there is very little, if any, controversy, If it would not, however, why, then of course, the plaintiff would be left in no worse position than it would have been in had the notice been given promptly. [78]

Thereupon counsel for defendant, before the jury retired, excepted to the said charge to the jury, and to the refusal of the Court to give as a part of the Court's charge instructions requested by the defendant as follows:

Mr. HUBBARD.—We at this time except to the refusal of the Court to give instructions 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14 and 15 as requested by the defendant; and to giving the instructions as to usage, and its effect and binding force upon the defendant; the instructions as to exoneration; the instruction as to recoupment, as to insolvency, as to the testimony of Stanley Dollar and the instruction as to the consideration of insolvency in connection with that, and as to bankruptcy not necessarily following from insolvency.

The instructions requested in writing by the defendant and furnished to the Court at the time and as required by law and the rules of said court, and which the Court failed and refused to give, are as follows, to wit:

[Instructions to Jury Requested by Defendant and Refused.]

Instruction No. 1.

You are instructed that the burden of proof is upon the plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that between the 19th and the 29th day of December, 1913, it advanced to the Alfred Johnson Lumber Company, a corporation, Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents

($5,887.78) upon the draft introduced in evidence here as Plaintiff's Exhibit #1.

Instruction No. 2.

You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that it could have attached the cargo or other property of the Alfred Johnson Lumber Company, a corporation, between the 19th and 29th days of December, 1913, and **[79]** that it could by reason of such attachment have saved itself the full sum of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents ($5,887.78), and before you can find that it could, by reason of any such attachment, have saved the said sum of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents ($5,887.78), you must further find from the evidence that the said Alfred Johnson Lumber Company, a corporation, was solvent during the said time, between said December 19th and 29th, 1913, and that said attachment would not have been dissolved or discharged by the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, within four (4) months after such attachment had been levied.

Jefferson Co. Savings Bank vs. Hendrix, 1 L. R. A. (N. S.) 246, 14 L. R. A. (N. S.) 686.

Brown v. Peoples Bank, 52 L. R. A. (N. S.) 660, 663, notes.

Instruction No. 3.

You are instructed that the burden of proof is

upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that any loss it may have sustained either from any indebtedness that was due to it from the Alfred Johnson Lumber Company, a corporation, on December 19th, 1913, or for any money that it may have advanced to said Alfred Johnson Lumber Company, a corporation, between December 15th and 29th, 1913, was solely, directly and proximately caused by the acts of the defendant, American National Bank, a corporation, in erroneously notifying plaintiff, Bank of Bandon, a corporation, on December 19th, 1913, that said draft had been accepted when it had not and failing, until December 29th, 1913, to notify plaintiff, Bank of Bandon, a corporation, that the draft had not been accepted; and in order for you to find that such acts on the part of defendant, American National Bank, a corporation, were the sole, proximate and direct [80] causes of such loss to plaintiff, Bank of Bandon, a corporation, you must further find from the evidence not only that the plaintiff, Bank of Bandon, a corporation, could have attached property of the Alfred Johnson Lumber Company, a corporation, between said December 19th and 29th, 1913, which property would be subject to attachment for said total indebtedness of Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents ($5,887.78) and sufficient in amount from which said Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents ($5,887.78) could have been realized, but you must also find from the evidence that said Alfred Johnson

Lumber Company, a corporation, was, between said dates, solvent, and that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, and that the plaintiff, Bank of Bandon, a corporation, refrained from attaching such property of the Alfred Johnson Lumber Company, a corporation, solely by reason of the fact that defendant, American National Bank, a corporation, had notified plaintiff on December 19th, 1913, that said draft had been accepted.

Instruction No. 4.

You are instructed that before you can render a verdict for plaintiff and against defendant, for any sum whatever, you must find from the evidence, not only that plaintiff has sustained actual damage from some act or omission of defendant, but that such actual damage was directly and proximately caused by defendant's act or omission, and not by some other act over which defendant had no control.

Instruction No. 5.

You are instructed that even though you should find from the evidence that plaintiff did refrain from attaching the cargo of cedar of the Alfred Johnson Lumber Company, a corporation, by [81] reason of the notification plaintiff received from defendant on December 19th, 1913, that the draft had been accepted; before you can find a verdict for plaintiff, you must further find from the evidence that plaintiff could have kept said cedar under attachment until it could have obtained judgment against said

Alfred Johnson Lumber Company, a corporation, and satisfaction of said judgment out of said attached cedar; and you must further find from the evidence that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, or by reason of any other act, within four (4) months after such attachment was levied.

Instruction No. 8.

You are further instructed that you should find from the evidence that even though the defendant did not notify the plaintiff that the draft had not been accepted until December 29th, 1913, yet, if you should further find from the evidence that the Alfred Johnson Lumber Company, a corporation, had assets sufficient in amount to satisfy plaintiff's claim of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents ($5,887.78) at any time after December 29th, 1913, against the Alfred Johnson Lumber Company, a corporation, and if you further find from the evidence that the plaintiff did not so attach such assets of the Alfred Johnson Lumber Company, a corporation, and thereby protect itself, your verdict must be for the defendant.

Instruction No. 9.

You are instructed that if the evidence shows the Alfred Johnson Lumber Company was a solvent, going concern on the 15th day of December, 1913, and was such thereafter up to and including the

29th day of December, 1913, you may consider this fact as bearing upon the question as to whether the Bank of Bandon would have attached [82] the cargo of lumber on board the ship "Grace Dollar," upon being informed on the 29th day of December, 1913, by defendant bank that the Robert Dollar Company had refused to accept the draft in question. In other words, you are not to conclude that merely because the acceptance of the draft by the Robert Dollar Company was refused on the 29th day of December, 1913, that such refusal operated to change the status of the Alfred Johnson Lumber Company from one of solvency to one of insolvency, or that such refusal was any ground for legal action by means of attachment or otherwise by the Bank of Bandon against the Alfred Johnson Lumber Company.

Instruction No. 10.

You are instructed to disregard all testimony as to any payments or advances made by the plaintiff, Bank of Bandon, to the Alfred Johnson Lumber Company upon the draft between December 15, 1913, and December 19, 1913, which said sums, according to the testimony, amount to the sum of Four Thousand Two Hundred and Eighty-seven Dollars and Thirty-six Cents ($4,287.36).

Instruction No. 11.

You are instructed that before you can find for the plaintiff, you must find from the evidence that the defendant by some act of omission or commission on its part caused the Bank of Bandon to change its position toward the Alfred Johnson Lumber Com-

pany, and by such act of the defendant, plaintiff either gave credit to the Alfred Johnson Lumber Company that it would not otherwise have given except for such act of omission or commission on the part of the defendant bank or refrained from taking legal proceedings to protect itself for any advances made by it to the Alfred Johnson Lumber Company; and you must further find from the evidence that such legal proceedings that it would have taken, except for such act of omission or commission on the part of the defendant bank, would have resulted in the plaintiff Bank of Bandon protecting [83] itself by reason of such legal proceedings which it might have taken.

Instruction No. 12.

You are instructed that where a bank accepts a bill of exchange or a draft for collection, it is bound to present the paper to the drawee at once, and if the drawee does not accept it, then the bank is bound to immediately notify the payee and the drawer; and if the bank does not do so, it is liable for all damages caused by its failure so to do; but the measure of damage is the amount actually paid out subsequent to the time at which the payee and the drawer should have been notified by the bank. All moneys paid out by the payee before the collecting bank has an opportunity to present the bill of exchange or draft to the drawee for acceptance are not chargeable to the bank; the bank is only liable for the damage sustained by the payee after a failure to present the bill of exchange or draft, as under the law it is required to do. If, therefore, you should find that the payee,

the Bank of Bandon, on December 15, 1913, sent a draft drawn by the Alfred Johnson Lumber Company to the American National Bank for the purpose of presenting it for acceptance to the Robert Dollar Company, but thereafter, and before the American National Bank actually received said draft, or had an opportunity of presenting said draft to the Robert Dollar Company for acceptance, the Bank of Bandon placed to the credit of Alfred Johnson Lumber Company an amount of money aggregating the sum of Forty-two Hundred Eighty-seven Dollars and Thirty-six Cents ($4,287.36), then I charge you that said American National Bank is not liable for the sum of money so placed to the credit of Alfred Johnson Lumber Company. [84]

Instruction No. 13.

I instruct you that it is not the law that merely because the Robert Dollar Company may have honored every draft presented to it by the American National Bank at the instance of the Bank of Bandon prior to December 15, 1913, the Robert Dollar Company was under any obligation to accept the draft in question; nor is it the law that the American National Bank, a mere agent for collection purposes of the Bank of Bandon, could be held liable for any moneys that the latter bank may have advanced to the Alfred Johnson Lumber Company prior to the time that such draft was received by the American National Bank.

Instruction No. 14.

You are instructed that if you find that it had been

the custom of the Robert Dollar Company to honor all drafts drawn by Alfred Johnson Lumber Company, such custom would not operate to render the American National Bank liable for advances by the Bank of Bandon prior to the date the draft reached the American National Bank, which, according to the evidence, was on the 19th day of December, 1913. Such custom, even if it could be held to be binding upon the Robert Dollar Company, would not be binding upon the American National Bank, for the custom, even if it exists, or had existed, established no contractual relation even by implication between the American National Bank and the Bank of Bandon. The liability of the American National Bank, as I have before instructed you, is made to depend solely upon the proposition whether or not the Bank of Bandon suffered loss or damage subsequent to the 19th day of December, 1913, on account of the failure of the American National Bank to present the draft in question to the Robert Dollar Company for acceptance, and for also having failed to notify the Bank of Bandon and the Alfred Johnson Lumber Company of what action it had taken with reference to the presentation of the draft. [85]

Instruction No. 15.

I instruct you that if, from the consideration of the evidence, you shall find that the Bank of Bandon sustained any loss or damage, such loss or damage must relate to the period of time subsequent to the 19th day of December, 1913, for under the circumstances of this case, it could not be held liable for any moneys that may have been advanced by the

Bank of Bandon to the Alfred Johnson Lumber Company prior to the date that the said draft was received by the American National Bank.

That after the Court had instructed the jury as above set forth, the cause was submitted to the jury, and the jury retired to deliberate upon the same, and thereafter returned into court and returned a verdict in favor of the plaintiff and against the defendant for the sum of Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents ($5,887.78), and which verdict was and is in the words and figures following, to wit:

Verdict.

(Title of Court and Cause.)

"We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Five Thousand Eight Hundred and Eighty-seven 78/100 Dollars.

A. W. LAWSON,
Foreman.

To which verdict and the whole thereof defendant then and there objected and excepted, and does hereby except, and specifies the same as error No. 36.

The foregoing constitutes all the proceedings had upon said trial. **[86]**

WHEREFORE, the defendant presents the above and foregoing as a full, true and correct Bill of Exceptions of all the proceedings had upon said trial and of its objections and exceptions, and prays that

the same may be settled and allowed as such.

EDGAR C. CHAPMAN,
WILLIAM P. HUBBARD,
Attorneys for Defendant.

Dated October 25th, 1915.

[Stipulation Re Bill of Exceptions.]

It is hereby stipulated and agreed that the above and foregoing is a full, true and correct bill of exceptions of all the proceedings had upon the trial of the above-entitled action, and that the same may be signed and settled and be used as such bill of exceptions upon the hearing by the United States Circuit Court of Appeals, Ninth Circuit.

Dated January 10th, 1916.

MASTICK & PARTRIDGE,
Attorneys for Plaintiff.
EDGAR C. CHAPMAN,
WILLIAM P. HUBBARD,
Attorneys for Defendant.

The foregoing bill of exceptions is hereby settled and allowed.

WM. C. VAN FLEET,
Judge.

February 29th, 1916.

[Endorsed]: Filed Feb. 29, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[87]**

In the District Court of the United States, for the Northern District of California, Second Division.

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,

Defendant.

Petition for Writ of Error and Supersedeas.

American National Bank, a Corporation, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 15th day of September, 1915, comes now by Edgar C. Chapman, Esq., and William P. Hubbard, Esq., its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

EDGAR C. CHAPMAN,
WILLIAM P. HUBBARD,
Attorneys for Defendant.

Dated February 8th, 1916.

Receipt of a copy of the within Petition for Writ of Error on the 8th day of February, 1916, is hereby admitted.

MASTICK & PARTRIDGE,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 8, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [88]

In the District Court of the United States, for the Northern District of California, Second Division.

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,
Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,
Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled action, and files the following Assignment of Errors on which it will rely in the prosecution of its writ of error in the above-entitled cause from the judgment made by this Honorable Court on the 15th day of September, 1915.

That the District Court of the United States, for the Northern District of California, Second Division, erred in the following rulings during the progress of the trial of said cause, to wit:

1. The Court erred in refusing to permit the defendant to ask the question on cross-examination of the witness George P. Topping as to the probable effect that an attachment levied by the plaintiff on the Alfred Johnson Lumber Company's property would have had in plunging it into bankruptcy, which question followed the following question and answer:

> "Q. You did not go into the question, then, as to whether, if you had attached, whether or not it would have been plunged into bankruptcy by other creditors?
>
> "A. That is a possibility, yes, at all times.

[89]

> "Q. This particular case, Mr. Topping, which we have discussed, was not that a possibility which confronted you?"

Which last question was objected to by the plaintiff on the ground that it was immaterial and incompetent, and that the defendant could not hide behind a mere possibility. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the same as error No. 1 in its bill of exceptions.

2. The Court erred in refusing to permit the defendant to ask the witness R. Stanley Dollar, who showed himself fully acquainted with the business

and affairs of the Alfred Johnson Lumber Company between December 15, 1913, and January 14, 1914, to answer as to those affairs in reply to the following question:

> "Q. How did the affairs stand at that time—between those dates, December 15th and December 29th?"

Which question was objected to by the plaintiff as incompetent, irrelevant and immaterial, and that the agent, the collecting bank holding the papers for collection, could not protect itself by taking refuge behind the fact that the drawee of a bill of exchange does not hold funds of the drawer. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the same as error No. 2 in its bill of exceptions.

3. The Court errred in refusing to permit the defendant to ask the witness R. Stanley Dollar to testify as to the general financial status of the Alfred Johnson Lumber Company as to solvency or insolvency, after he had testified that he went through the books of the Alfred Johnson Lumber Company to ascertain the status of its financial affairs, which question was as follows:

> "Q. Now, from that going through the books what did you ascertain as to the general financial status of the Alfred Johnson [90] Lumber Company as to solvency or insolvency as it appeared subsequent to the 15th of December, 1913?"

Which question was objected to by the plaintiff as immaterial, irrelevant, incompetent, and not the best

evidence and calling for the conclusion of the witness. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the same as error No. 3 in its bill of exceptions.

4. The Court erred in refusing to permit the defendant to ask of the witness R. Stanley Dollar as to what position in reference to the affairs of the Alfred Johnson Lumber Company the Robert Dollar Company would have taken in December, 1913, had it known that a cargo of cedar had been attached or was about to be attached by the plaintiff upon this draft in question, which question was as follows:

> "Q. Mr. Dollar, what position in reference to the affairs of the Alfred Johnson Lumber Company would the Robert Dollar Company have taken had it known that this particular cargo of cedar had been attached or was about to be attached by the Bank of Bandon?"

Which question was objected to by the plaintiff as irrelevant and incompetent. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the same as error No. 4 in its bill of exceptions.

5. The Court erred in refusing to permit the defendant to ask of the witness R. Stanley Dollar what the arrangement was between the creditors and the Alfred Johnson Lumber Company, which question was as follows:

> "Q. What was that arrangement?"

Which question was objected to by the plaintiff as

not the best evidence. Which objection was by the Court sustained, and to which defendant then and there duly excepted, and specifies the [91] same as error No. 5 in its bill of exceptions.

6. The Court erred in permitting the plaintiff to ask of the witness Frank P. Doe as to whether the Coquille Mill & Towboat Company has received any money from the Alfred Johnson Lumber Company on the 28th of January, 1914, which question was as follows:

> "Q. Now, Mr. Doe, refreshing your memory from that in your own handwriting, will you state whether or not you received any money from the Alfred Johnson Lumber Company on the 28th of January, 1914?"

Which question was objected to by the defendant as immaterial, irrelevant and incompetent. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 6 in its bill of exceptions.

"A. Yes, we did.

7. The Court erred in permitting the witness Frank P. Doe to answer the question asked by the plaintiff as to the amount of payment made by the Alfred Johnson Lumber Company to the Coquille Mill & Towboat Company on the 28th of January, 1914, which question was as follows:

"Q. How much?"

Which question was objected to by the defendant as immaterial, irrelevant and incompetent. Which objection was by the Court overruled, and to which

defendant then and there duly excepted, and specifies the same as error No. 7 in its bill of exceptions.

"A. $269.40."

8. The Court erred in permitting the plaintiff to ask the witness Frank P. Doe in rebuttal as to what such payment was for, which question was as follows:

"Q. What was that for?"

Which question was objected to by the defendant as incompetent, irrelevant and immaterial. Which objection was by the **[92]** Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 8 in its bill of exceptions.

"A. That was for logs sold prior to the first of January—that is stumpage I mean."

9. The Court erred in permitting the plaintiff to ask the witness Frank P. Doe in rebuttal in what way that amount was paid to the Coquille Mill & Towboat Company, which question was as follows:

"Q. Now, then, in what way was that amount paid to you?"

Which question was objected to by the defendant as irrelevant, incompetent and immaterial. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 9 in its bill of exceptions.

"A. By the Robert Dollar Company."

10. The Court erred in permitting the plaintiff to ask the further question of the witness Frank P. Doe in rebuttal as follows:

"Q. By a draft on them by the Alfred Johnson Lumber Company, you mean?"

Which question was objected to by the defendant as irrelevant, incompetent and immaterial. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 10 in its bill of exceptions.

"A. No. As I recollect, this amount was due, and they sent us out their check for it."

11. The Court erred in permitting the plaintiff to ask of the witness S. P. Bartlett in rebuttal as to his knowledge or reason to believe that the draft drawn on December 15, 1913, upon the Robert Dollar Company would not be honored, which question was as follows: **[93]**

"Q. In December—that is, on the 15th of December, 1913, when the draft was drawn for that month's pay-roll—did you have any knowledge or any reason to believe that the draft would not be honored by the Dollar Company?"

Which question was objected to by the defendant as irrelevant, incompetent and immaterial and not rebuttal. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 11 in its bill of exceptions.

"A. No."

12. The Court erred in permitting the plaintiff to ask of the witness George P. Topping in rebuttal as to whether the mortgage about which he had testified previously as being on the property of the

Alfred Johnson Lumber Company was foreclosed, which question was as follows:

"Q. Mr. Topping, do you know whether or not that mortgage that was on the mill and property of the Alfred Johnson Lumber Company was forclosed?"

Which question was objected to by the defendant as immaterial, irrelevant and incompetent, and not rebuttal. Which objection was by the Court overruled, and to which defendant then and there duly excepted, and specifies the same as error No. 12 in its bill of exceptions.

"A. Yes, I do know. It had been foreclosed and the property sold. I could not give the exact date of the sale, but I think some time during the latter part of August or first of September, 1915. It was sold for approximately $9,400; that is, it was sold for less than the face of the mortgage."

13. The Court erred in orally instructing the jury as follows:

"Gentlemen of the jury, you are perhaps sufficiently aware **[94]** of the nature of this action at this time. It is an action by the plaintiff to recover by reason of the alleged negligent failure of the defendant to notify the plaintiff of the dishonor of a draft which had been drawn upon the Robert Dollar Company, and which, when presented to that company, it appears, was dishonored. Under the principles that I shall state to you, the case is a very simple one. It

simply depends upon whether or not, by reason of the act of the defendant, about which there is no controversy under the evidence, the plaintiff lost the money for which suit is being prosecuted, or whether, by reason of the circumstances, the act of the defendant in nowise contributed to that loss, but that the plaintiff would have lost the money nevertheless.

"A bank undertaking the collection of a foreign draft—and this was what is known as a foreign draft—must use reasonable and due diligence to protect the owner of the draft by taking all such steps by presentment, demand, protest and notice as are necessary to fix the liability of all parties to whom the owner has the right to resort for payment. The collecting bank as bound to present the draft to the drawee at once, and if the drawee does not accept it, then the bank is bound to immediately notify the payee and drawer, and if the bank does not do so it is liable for all damages caused by its failure so to do, that is, all damages proximately flowing from its failure, the measure of damages being the amount of money actually paid out, together with interest."

To the giving of which said instruction the defendant objected and excepted and hereby excepts, and specifies that said instruction does not state correct principles of law in the following particulars:

(a) In that the collecting bank is not bound to present the draft to the drawee at once, or at all,

where the drawer is insolvent, and where the drawee has no funds of the drawer, but, on [95] the contrary holds large obligations of the drawer aggregating ten times the value of the drawer's assets;

(b) In that the measure of damages recoverable against the collecting bank does not include the amount of moneys paid out by the payee to the drawer prior to the time at which the collecting bank received such draft, or had an opportunity of presenting it for acceptance;

(c) In that the collecting bank is not bound to immediately or ever notify the payee and drawer, where both of them know that the drawer is insolvent, and that the drawee is a creditor of the drawer to the extent of $97,000—or fully nine times the value of the drawer's available assets;

(d) In that this instruction in stating that the collecting bank is bound to notify the payee and drawer conflicts with the following instruction given by the Court.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 13 in its bill of exceptions.

14. The Court erred in orally instructing the jury as follows:

> "The instrument involved in this action is a foreign draft or bill of exchange, and notice of the dishonor of such an instrument can be given only by notice of protest, which must be noted on the day of presentment or the next business day."

To the giving of which instruction the defendant objected and excepted, and specifies the following ground of objection and exception to said instruction—namely, that said instruction conflicts with the immediately preceding instruction in instructing the jury that the notice of protest must be noted on the day of presentment or the next business day.

To the giving of which instruction the defendant objected **[96]** and excepted and hereby excepts, and specifies the same as error No. 14 in its bill of exceptions.

15. The Court erred in orally instructing the jury as follows:

> "A draft is dishonored when it is either not paid or not accepted on presentment for the purpose. Notice of the dishonor of a draft when given by mail must be deposited in the postoffice in time for the first mail which closes after noon of the first business day succeeding the dishonor and which leaves the place where the instrument was dishonored for the place to which the notice should be sent. All of these are code provisions.
>
> "If you find that a usage existed between the parties from their course of dealing, whereby plaintiff, in the ordinary course of business, advanced money to the Alfred Johnson Lumber Company immediately upon the latter drawing a draft in favor of the former, and that because of this usage there was an implied agreement between the plaintiff and defendant under which defendant was to notify plaintiff by telegraph immediately upon the nonacceptance or dis-

honor of any such draft exceeding five hundred dollars in amount; and if you further find that through defendant's negligence plaintiff was not so notified by telegraph or in any other manner promptly of the nonacceptance of the draft involved in this case, and that solely because of such negligence of defendant plaintiff became unable to collect the money advanced on said draft in accordance with such usage, then defendant would be liable for all money advanced by plaintiff on said draft to the drawer, even though advanced before the draft had been received by the defendant for collection."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception: **[97]**

(a) In that the Court instructed the jury that an implied agreement could exist which would bind the collecting bank to reimburse the plaintiff for moneys advanced to the drawer, amounting to $4,287.36, before the receipt of the draft by the collecting bank—such agreement arising out of a custom to the effect that all drafts theretofore drawn had been accepted by the Robert Dollar Company;

(b) In that by this instruction the Court instructed the jury that the defendant was liable for all money advanced by plaintiff on the draft to the drawer—even though such money was advanced before the draft had been received or could by any possibility have been received by the defendant;

(c) In that by said instruction the Court instructed the jury that the defendant was liable to the plaintiff solely by reason of this usage or custom, regardless of the fact that the defendant could not by any possible means have had knowledge of the existence of the draft or received the same until four days after it was drawn and deposited with the plaintiff;

(d) In that the Court asserts that the liability of the defendant is made to depend upon the mere fact that defendant failed to notify plaintiff promptly of the dishonor or acceptance of the draft, rather than upon the proposition that defendant's liability is made to depend solely upon the amount of actual damages sustained by plaintiff arising out of and directly traceable to the failure of defendant to give prompt notice of such dishonor or acceptance; in other words, the defendant's liability is not to be measured by the amount of the face of the draft in question, but by ascertaining to what extent defendant's negligence contributed to plaintiff's loss, if any.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 15 in its bill of exceptions. [98]

16. The Court erred in orally instructing the jury as follows:

> "If prompt notice of the dishonor of a bill of exchange or draft is not given to the drawer, then it is exonerated—that is, the drawer,—

from all liability on the draft. It would therefore make no difference, under such circumstances, whether the drawer was insolvent or not, because it would not be required to make good the amount."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception;

(a) In that by said instruction the Court instructed the jury that failure to give prompt notice of the dishonor of the draft to the Alfred Johnson Lumber Company would release it from all liability on the draft; while as a matter of law the question of whether the Alfred Johnson Lumber Company would be released from all liability to pay plaintiff would be made to depend upon the good faith of the Alfred Johnson Lumber Company in drawing such draft on the Robert Dollar Company. If the Alfred Johnson Lumber Company, when it drew the draft upon the Robert Dollar Company, was a creditor of the latter company to the extent of $97,000 and knew that it was insolvent, then, as a matter of law, the Alfred Johnson Lumber Company was not injured by the negligence of defendant above mentioned;

(b) In that the drawer is not exonerated from all liability upon the draft for the failure of the collecting bank to give prompt notice to the drawer of its dishonor, where at the time of drawing the draft he had reason to believe that it would be accepted. The fact that the drawee had accepted other drafts from time to time could not operate to discharge an insol-

vent drawer from the full amount of the liability which would have rested [99] upon him had no draft been drawn;

(c) In that the Court erroneously instructed the jury that under the circumstances of this case it made no difference whether the drawer was insolvent or not for the reason that the drawer would not be required to make good the amount of the draft; when it is unquestionably the law that the drawer is not relieved from liability where at the time of issuing the draft it had placed no funds in the hands of the Robert Dollar Company, and was without the expectation thereafter of placing any funds in its hands;

(d) In that the Court by this instruction instructed the jury that the insolvency of the drawer was not to be considered material in determining this case;

(e) In that this instruction conflicts with and is contradictory to subsequent instructions given by the Court upon the question of insolvency;

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 16 in its bill of exceptions.

17. The Court erred in instructing the jury orally as follows:

> "The burden of proof is upon the plaintiff to show by a preponderance of evidence the facts upon which it relies for recovery, the amount of money that it advanced on the draft to the drawer, and to show that its failure to collect

that money was directly and proximately caused by the act or omission of the defendant alleged in the complaint."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception: [100]

(a) In that the Court failed to instruct the jury that the burden of proof was upon the plaintiff to also show by a preponderance of evidence that the Alfred Johnson Lumber Company was solvent at the time it (plaintiff) advanced the money on the draft, and became insolvent prior to the time that the plaintiff received notice that the draft had not been accepted by the Robert Dollar Company;

(b) In that the Court by specifying the specific matters in said instruction which must be proved by the plaintiff by a preponderance of evidence thereby led the jury to believe that it was not incumbent upon the plaintiff to establish other essential facts by a preponderance of evidence before a verdict could be rendered in favor of the plaintiff—namely, that the plaintiff should show by a preponderance of evidence that it could have protected itself for the money it advanced upon the draft, had it received notice from the defendant that the draft had not been accepted, and that the Alfred Johnson Lumber Company was not insolvent at the time plaintiff contended it could have attached the cargo of cedar."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and

specifies the same as error No. 17 in its bill of exceptions.

17½. The Court erred in instructing the jury orally as follows:

> "If, therefore, you find that the plaintiff, after having been actually notified of the nonacceptance by defendant, even though such notice was not promptly given, could by reasonable effort have collected from the drawer the amount of money advanced to the latter, then the plaintiff would not be entitled to recover. If it could not have so recouped itself, then the defendant is liable for the loss. It was only bound to use such reasonable diligence [101] as a business man of ordinary prudence would have used under like circumstances. You will understand, therefore, that before you can find for the plaintiff it must appear that defendant's action, in view of the course of dealing between the parties, caused the plaintiff to change its position toward the drawer of the draft, and by such act plaintiff either gave credit to the drawer that it might otherwise not have given, or refrained from taking legal proceedings to protect itself for the advances made by it to the drawer."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exceptions

(a) In that the Court instructed the jury that if the plaintiff could have recouped itself from loss by reason of the advance upon the draft, that such fact

entitled plaintiff to a recovery—regardless of the fact as to whether the Alfred Johnson Lumber Company was then solvent or insolvent, and regardless of the fact as to whether the plaintiff was justified in advancing the money upon the draft before the draft could possibly have reached the defendant, or before the defendant could by any possible means have communicated with the plaintiff or the Alfred Johnson Lumber Company as to the nonacceptance of said draft;

(b) In that this instructon instructed the jury that the defendant was liable to the plaintiff for the money advanced upon the draft, regardless of any other conditions which might have existed whereby plaintiff might have been prevented from recovering from the Alfred Johnson Lumber Company;

(c) In that the said instruction instructed the jury that the previous course of dealing between the parties would entitle the plaintiff to advance the money on the draft, regardless of the fact that the testimony shows that the sum of $4,287.36 was advanced by the plaintiff to the Alfred Johnson Lumber Company [102] upon the draft before the draft could by any possibility have reached the defendant;

(d) In that the Court instructed the jury that the defendant would be liable to the plaintiff by reason of the course of dealing between the parties, regardless of the fact that the sum of $4,287.36 was advanced upon the said draft by the plaintiff to the Alfred Johnson Lumber Company prior to the time that the said draft could by any possibility have

reached the defendant, and regardless of the fact that at all times from and after December 15, 1913, to the middle of January, 1914, the Alfred Johnson Lumber Company was insolvent and indebted to numerous creditors in the sum of $147,400, and had no assets other than the cargo of cedar of the value of about $10,000 or $12,000.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 17½ in its bill of exceptions.

18. The Court erred in instructing the jury orally as follows:

> "Now, on the subject of the insolvent condition of the parties which has been, to some extent, argued before you, I advise you thus: A person or corporation is insolvent whenever the aggregate of his or its property, exclusive of any property which he or it may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his or its creditors, shall not, at a fair valuation, be sufficient in amount to pay his or its debts.
>
> "The lien of an attachment obtained by any creditor upon any property of a debtor is dissolved by the adjudication of bankruptcy of a person or corporation whose property is so attached within four months before the filing of bankruptcy proceedings, either against such person or corporation by the creditors or by [103]

the person or corporation themselves, if such lien of the attachment was obtained and permitted while the person or corporation was insolvent, and that the existence and enforcement of such lien of attachment will work a preference or the creditor so attaching had reasonable cause to believe the person or corporation debtor was insolvent and in contemplation of bankruptcy at the time of such attachment. I state to you this latter principle because of the contentions put forth by the defendant here."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception:

In that by said instruction the Court, after correctly stating the law to the jury as to the effect of an attachment levied within four months before the filing of bankruptcy proceedings, added to the instruction this clause: "I state to you this latter principle because of the contentions put forth by the defendant here"; in that such statement led the jury to believe that the Court regarded such statement of the law as having no effect in determining the issues of the case.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 18 in its bill of exceptions.

19. The Court erred in instructing the jury orally as follows:

"You are to determine, under all the circumstances that have been submitted to you here, and from all the evidence in the case, what the real situation was in reference to this transaction. It does not appear here in any direct, positive way that the Johnson Lumber Company was insolvent within the definition which I have given you from the bankruptcy act. There is evidence here, however, from which the jury would be at liberty to so infer." **[104]**

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception;

(a) In that the Court by said instruction instructed the jury that they might consider all the circumstances that had been submitted to them, rather than confine themselves exclusively to the evidence in the case;

(b) In that the Court by this instruction instructed the jury that it did not appear in any direct, positive way that the Alfred Johnson Lumber Company was insolvent within the definition which the Court had given from the bankruptcy act—in the face of the positive, direct and uncontradicted testimony that the Alfred Johnson Lumber Company owed to numerous creditors $147,400, and did not have assets, at a fair valuation, sufficient in amount to pay its debts, and also in the face of the positive testimony that the Alfred Johnson Lumber Company was insolvent.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 19 in its bill of exceptions.

20. The Court erred in instructing the jury orally as follows:

> "There was testimony given by Mr. Stanley Dollar on the witness stand that he examined the books of the Johnson Lumber Company, and he said it was in an insolvent condition. Now, of course, that evidence is not evidence of insolvency—I mean such evidence does not of itself necessarily establish insolvency. Insolvency is a legal status and it is the result of the existence of the conditions which the bankruptcy act has given as constituting insolvency, and which I have read to you. And a witness merely saying that a party is insolvent is therefore stating a mere conclusion; **[105]** and you will understand that you are not bound from the testimony of that witness alone to determine that the Johnson Lumber Company was insolvent at the time. You have a right to consider the facts which the witness stated, though, independently of that conclusion, together with all of the other evidence in the case in determining whether it was insolvent."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception:

(a) In that the Court by said instruction negatived the positive testimony of the witness Stanley Dollar as to the insolvency of the Alfred Johnson Lumber Company by telling the jury that the testimony of this witness was not evidence of insolvency;

(b) In that by this instruction the Court instructed the jury that a witness' testimony that a party was insolvent was stating a conclusion, in the face of the fact that the witness testified fully that his information was gathered from and was a summary or result of a thorough personal examination of all of the books of the Alfred Johnson Lumber Company and a careful examination of its affairs at its place of business in Bandon, at a time when the witness was the representative of the largest creditor of the Alfred Johnson Lumber Company.

(c) In that the Court by the following clause of the instruction, namely: "You have a right to consider the facts which the witness stated, though, independently of that conclusion, together with all of the other evidence in the case in determining whether it was insolvent"—negatived the testimony of the witness Dollar and led the jury to believe that his testimony was not to be believed.

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error [106] No. 20 in its bill of exceptions.

21. The Court erred in instructing the jury orally as follows:

"The question of the insolvency of the John-

son Lumber Company, and its financial ability to meet its obligations, is only material in this case as bearing upon the question whether or not, had the plaintiff in this case been afforded an opportunity to attach that property, such attachment would have availed to secure a liquidation of their debt, the theory of the defendant being that if they had notified them in time to levy such an attachment, that the interposition of bankruptcy proceedings would have negatived the value of any such attachment. It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man may be in shaky circumstances, that because he may actually *be insolvent* circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor's claim without actually putting him into insolvency; but, nevertheless, you have a right, under all the evidence that has been submitted to you, to determine what would have been the probable effect of the levying of the attachment for the claim of plaintiff which is here sued upon, had they been notified in time of the dishonor of this draft."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception:

(a) In that the Court by this instruction, after stating to the jury the materiality of the question of the insolvency of [107] the Alfred Johnson Lumber Company, negatived the effect of any instruction whatsoever upon the insolvency of the Alfred Johnson Lumber Company and its financial status by the following clause of the instruction: "It has occurred, in all probability, in the practical experience of many of you that it does not necessarily follow that because a man be in shaky circumstances that because he may actually be in solvent circumstances, an attachment does not secure the benefit to the attaching creditor which it is intended to avail him, because, if those circumstances occur, there may be conditions existing which will bring to the aid of the insolvent debtor from those interested in his business the means to meet the attaching creditor's claim without actually putting him into insolvency." Which said statement was not supported by any evidence, and was outside of the record and unnecessary, and which statement prejudiced the whole of defendant's case in the minds of the jury, and led the jury to believe they could take into consideration mere suppositions, probabilities and matters not in evidence in determining the solvency or insolvency of the Alfred Johnson Lumber Company.

To the giving of which instruction the defend-

ant objected and excepted and hereby excepts, and specifies the same as Error No. 21 in its bill of exceptions.

22. The Court erred in instructing the jury orally as follows:

> "As I suggested at the beginning, the liability of the defendant for this obligation growing out of its tort—because negligence under such conditions gives rise to a tortious demand—depends upon the question whether the plaintiff's loss arose through that act, or whether, it would have suffered the loss independently of that act—whether, in the event that the defendant had strictly and in accordance with its legal obligations, given a notice promptly [108] and had the draft protested, it would have availed the plaintiff and it could have saved itself by proper proceedings. If it would, the plaintiff is undoubtedly, under the facts before you, entitled to recover, because as to those facts there is very little, if any, controversy. If it would not, however, why, then, of course, the plaintiff would be left in no worse position than it would have been in had the notice been given promptly."

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the following grounds of objection and exception:

In that by this instruction the Court attempted to summarize the whole case, and state that the liability of the defendant depended upon the question

whether the plaintiff could have availed itself of proper proceedings and saved itself from loss, and omitted the principal elements of the defendant's case—namely, the question as to whether the plaintiff was not responsible for the loss by reason of its having advanced the sum of $4,287.36 on the draft to the Alfred Johnson Lumber Company before the draft could have reached the defendant; and also the question as to whether at any time after the advance of such money the plaintiff could have taken any proceedings whatsoever to have collected such money so advanced, by reason of the insolvent condition of the Alfred Johnson Lumber Company;

To the giving of which instruction the defendant objected and excepted and hereby excepts, and specifies the same as error No. 22, in its bill of exceptions.

23. The Court erred in refusing to give the instruction asked by the defendant as follows:

Instruction No. 1.

"You are instructed that the burden of proof is upon the plaintiff, Bank of Bandon, a corporation, to show by the preponderance [109] of the evidence that between the 19th and the 29th days of December, 1913, it advanced to the Alfred Johnson Lumber Company, a corporation, Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents ($5,887.78), upon the draft introduced in evidence here as Plaintiff's Exhibit #1."

To the refusal of the Court to give said instruction

the defendant objected and excepted and now excepts, and specifies the same as error No. 23 in its bill of exceptions.

24. The Court erred in refusing to give the instruction asked by the defendant as follows:

Instruction No. 2.

"You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that it could have attached the cargo of lumber or other property of the Alfred Johnson Lumber Company, a corporation, between the 19th and 29th days of December, 1913, and that it could by reason of such attachment have saved itself the full sum of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents ($5,887.78), and before you can find that it could, by reason of any such attachment, have saved the said sum of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents ($5,887,78), you must further find from the evidence that the said Alfred Johnson Lumber Company, a corporation, was solvent during the said time, between said December 19th and 29th, 1913, and that said attachment would not have been dissolved or discharged by the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, within four (4) months after such attachment had been levied.

Jefferson Co. Savings Bank vs. Hendrix, 1 L. R. A. (N. S.) 246; 14 L. R. A. (N. S.) 686.

Brown vs. Peoples Bank, 52 L. R. A. (N. S) 660, 663, Notes." **[110]**

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 24 in its bill of exceptions.

25. The Court erred in refusing to give the instruction asked by the defendant as follows:

Instruction No. 3.

"You are instructed that the burden of proof is upon plaintiff, Bank of Bandon, a corporation, to show by the preponderance of the evidence that any loss it may have sustained either from any indebtedness that was due to it from the Alfred Johnson Lumber Company, a corporation, on December 19th, 1913, or for any money that it may have advanced to said Alfred Johnson Lumber Company, a corporation, between December 15th and 29th, 1913, was solely, directly and proximately caused by the acts of the defendant, American National Bank, a corporation, in erroneously notifying plaintiff, Bank of Bandon, a corporation, on December 19th, 1913, that said draft had been accepted when it had not, and failing, until December 29th, 1913, to notify plaintiff, Bank of Bandon, a corporation; that the draft had not been accepted; and in order for you to find that such acts on the part of defendant, American National Bank, a corporation, were the sole, proximate and direct causes of such loss to plaintiff, Bank of Bandon, a corporation, you must fur-

ther find from the evidence not only that the plaintiff, Bank of Bandon, a corporation, could have attached property of the Alfred Johnson Lumber Company, a corporation, between said December 19th and 29th, 1913, which property would be subject to attachment for said total indebtedness of Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents ($5,887,78), and sufficient in amount from which said Five Thousand Eight Hundred and Eighty-seven Dollars and Seventy-eight Cents ($5,887.78) could have been realized, but you must also find from the evidence that said Alfred Johnson Lumber Company, [111] a corporation, was, between said dates, solvent, and that said attachment would not have been dissolved or discharged by reason of the insolvency or bankruptcy of said Alfred Johnson Lumber Company, a corporation, and that the plaintiff, Bank of Bandon, a corporation, refrained from attaching such property of the Alfred Johnson Lumber Company, a corporation, solely by reason of the fact that defendant, American National Bank, a corporation, had notified plaintiff on December 19th, 1913, that said draft had been accepted."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 25, in its bill of exceptions.

26. The Court erred in refusing to give the in-

struction asked by the defendant as follows:

Instruction No. 4.

"You are instructed that before you can render a verdict for plaintiff and against defendant, for any sum whatever, you must find from the evidence, not only that plaintiff has sustained actual damage from some act or omission of defendant, but that such actual damage was directly and proximately caused by defendant's act or omission, and not by some other act over which defendant had no control."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 26 in its bill of exceptions.

27. The Court erred in refusing to give the instruction asked by the defendant as follows:

Instruction No. 5.

"You are instructed that even though you should find from the evidence that plaintiff did refrain from attaching the cargo of cedar of the Alfred Johnson Lumber Company, a corporation **[112]** by reason of the notification plaintiff received from defendant on December 19th, 1913, that the draft had been accepted; before you can find a verdict for plaintiff, you must further find from the evidence that plaintiff could have kept said cedar under attachment until it could have obtained judgment against said Alfred Johnson Lumber Company, a corporation, and satisfaction of said judgment out

of said attached cedar; and you must further find from the evidence that said attachment would not have been dissolved or discharged by reason of the insolvency of bankruptcy of said Alfred Johnson Lumber Company, a corporation, or by reason of any other act, within four (4) months after such attachment was levied."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 27 in its bill of exceptions.

28. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 8.

"You are further instructed that should you find from the evidence that even though the defendant did not notify the plaintiff that the draft had not been accepted until December 29th, 1913, yet, if you should further find from the evidence that the Alfred Johnson Lumber Company, a corporation, had assets sufficient in amount to satisfy plaintiff's claim of Five Thousand Eight Hundred Eighty-seven Dollars and Seventy-eight Cents ($5,887.78), at any time after December 29th, 1913, against the Alfred Johnson Lumber Company, a corporation, and if you further find from the evidence that the plaintiff did not so attach such assets of the Alfred Johnson Lumber Company, a corporation, and thereby protect itself, your verdict must be for the defendant."

To the refusal of the Court to give said instruction the [113] defendant objected and excepted and now excepts, and specifies the same as error No. 28.

29. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 9.

"You are instructed that if the evidence shows the Alfred Johnson Lumber Company was a solvent, going concern on the 15th day of December, 1913, and was such thereafter up to and including the 29th day of December, 1913, you may consider this fact as bearing upon the question as to whether the Bank of Bandon would have attached the cargo of lumber on board the ship 'Grace Dollar,' upon being informed on the 29th day of December, 1913, by defendant bank that the Robert Dollar Company had refused to accept the draft in question. In other words, you are not to conclude that merely because the acceptance of the draft by the Robert Dollar Company was refused on the 29th day of December, 1913, that such refusal operated to change the status of the Alfred Johnson Lumber Company from one of solvency to one of insolvency, or that such refusal was any ground for legal action by means of attachment or otherwise by the Bank of Bandon against the Alfred Johnson Lumber Company."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 29 in its bill of exceptions.

20. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 10.

"You are instructed to disregard all testimony as to any payments or advances made by the plaintiff, Bank of Bandon, to the Alfred Johnson Lumber Company upon the draft, between December 15, 1913, and December 19, 1913, which said sums, according to the [114] testimony, amount to the sum of Four Thousand Two Hundred and Eighty-seven Dollars and Thirty-six Cents ($4,287.36)."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 30 in its bill of exceptions.

31. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 11.

"You are instructed that before you can find for the plaintiff, you must find from the evidence that the defendant by some act of omission or commission on its part caused the Bank of Bandon to change its position towards the Alfred Johnson Lumber Company, and by such act of the defendant, plaintiff either gave credit to the Alfred Johnson Lumber Company that it would not otherwise have given except for such act of omission or commission on the part of the defendant bank, or refrained from taking legal proceedings to protect itself from any advances made by it to the Alfred Johnson Lumber Com-

pany; and you must further find from the evidence that such legal proceedings that it would have taken, except for such act of omission or commission on the part of the defendant bank, would have resulted in the plaintiff Bank of Bandon protecting itself by reason of such legal proceedings which it might have taken."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 31 in its bill of exceptions.

32. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 12.

"You are instructed that where a bank accepts a bill of exchange or a draft for collection, it is bound to present the paper [115] to the drawee at once, and if the drawee does not accept it, then the bank is bound to immediately notify the payee and the drawer; and if the bank does not do so, it is liable for all damages caused by its failure so to do; but the measure of damage is the amount actually paid out subsequent to the time at which the payee and the drawer should have been notified by the bank. All moneys paid out by the payee before the collecting bank has an opportunity to present the bill of exchange or draft to the drawee for acceptance are not chargeable to the bank; the bank is only liable for the damage sustained by the payee after a failure to present the bill of exchange or draft, as under the law it is required

to do. If, therefore, you should find that the payee, the Bank of Bandon, on December 15, 1913, sent a draft drawn by the Alfred Johnson Lumber Company to the American National Bank for the purpose of presenting it for acceptance to the Robert Dollar Company, but thereafter, and before the American National Bank actually received said draft, or had an opportunity of presenting said draft to the Robert Dollar Company for acceptance, the Bank of Bandon placed to the credit of the Alfred Johnson Lumber Company an amount of money aggregating the sum of Forty-two Hundred Eighty-seven Dollars and Thirty-six Cents ($4,287.36), then I charge you that said American National Bank is not liable for the sum of money so placed to the credit of Alfred Johnson Lumber Company."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 32 in its bill of exceptions.

33. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 13.

"I instruct you that it is not the law that merely because **[116]** the Robert Dollar Company may have honored every draft presented to it by the American National Bank at the instance of the Bank of Bandon prior to December 15, 1913, the Robert Dollar Company was under any obligation to accept the draft in question;

nor is it the law that the American National Bank, a mere agent for collection purposes of the Bank of Bandon, could be held liable for any moneys that the latter bank may have advanced to the Alfred Johnson Lumber Company prior to the time that such draft was received by the American National Bank."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 33 in its bill of exceptions.

34. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 14.

"You are instructed that if you find that it had been the custom of the Robert Dollar Company to honor all drafts drawn by Alfred Johnson Lumber Company, such custom would not operate to render the American National Bank liable for advances made by the Bank of Bandon prior to the date the draft reached the American National Bank, which, according to the evidence, was on the 19th day of December, 1913. Such custom, even if it could be held to be binding upon the Robert Dollar Company, would not be binding upon the American National Bank, for the custom, even if it exists or had existed, established no contractual relation even by implication between the American National Bank and the Bank of Bandon. The liability of the American National Bank, as I have before instructed you, is made to depend solely

upon the proposition whether or not the Bank of Bandon suffered loss or damage subsequent to the 19th day of December, 1913, on account of the failure of the American National Bank to present the draft in question to the Robert Dollar Company for acceptance, and for also having failed to notify **[117]** the Bank of Bandon and the Alfred Johnson Lumber Company of what action it had taken with reference to the presentation of the draft."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 34 in its bill of exceptions.

35. The Court erred in refusing to give the instruction asked by defendant as follows:

Instruction No. 15.

"I instruct you that if, from the consideration of the evidence, you shall find that the Bank of Bandon sustained any loss or damage, such loss or damage must relate to the period of time subsequent to the 19th day of December, 1913, for, under the circumstances of this case, it could not be held liable for any moneys that may have been advanced by the Bank of Bandon to the Alfred Johnson Lumber Company prior to the date that the said draft was received by the American National Bank."

To the refusal of the Court to give said instruction the defendant objected and excepted and now excepts, and specifies the same as error No. 35 in its bill of exceptions.

WHEREFORE, the defendant and plaintiff in error prays that said judgment be reversed, and that said District Court of the United States, for the Northern District of California, be ordered to enter a judgment reversing the judgment and decision of the lower court in said cause.

EDGAR C. CHAPMAN,
WILLIAM P. HUBBARD.

Attorneys for Defendant and Plaintiff in Error.

Dated February 8th, 1916. [118]

Receipt of a copy of the within Assignment of Errors on the 8th day of February, 1916, is hereby admitted.

MASTICK & PARTRIDGE,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 8, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [119]

In the District Court of the United States, for the Northern District of California, Second Division.

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,
Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,
Defendant.

Order Allowing Writ of Error [and Fixing Amount of Bond].

Upon motion of Edgar C. Chapman, Esq., and William P. Hubbard, Esq., attorneys for defendant, and upon filing a petition for a writ of error, and an assignment of errors:

It is Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby if fixed at five hundred ($500) Dollars.

Dated this 8th day of February, 1916.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 8, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[120]**

In the District Court of the United States, for the Northern District of California, Second Division.

Hon. WILLIAM C. VAN FLEET, Judge.

No. 15,831.

BANK OF BANDON, a Corporation,
Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, American National Bank (a corporation), as principal, and Geo. N. O'Brien and D. B. Fuller, *a* sureties, are held and firmly bound unto Bank of Bandon (a corporation), plaintiff above named, in the sum of Five Hundred (500) Dollars, to be paid to the said Bank of Bandon, its successors and assigns, for which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 15th day of February, 1916.

WHEREAS, the above-named defendant, American National Bank (a corporation), has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States, for the Northern District of California (Second Division):

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make [121] good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEO. N. O'BRIEN,
D. B. FULLER.

Northern District of California,
City and County of San Francisco,—ss.

Geo. N. O'Brien and D. B. Fuller, the sureties named in the within and foregoing Bond, being duly sworn, each for himself, and not one for the other, says: That he is a resident and freeholder within the State of California, and that he is worth the sum specified in said Bond, over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEO. N. O'BRIEN.
D. B. FULLER.

Subscribed and sworn to before me this 15 day of February, 1916.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 7, 1918.

Approved this 17th day of February, 1916.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 17, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[122]**

[Certficate of Clerk, U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,831.

BANK OF BANDON, a Corporation,

Plaintiff,

vs.

AMERICAN NATIONAL BANK, a Corporation,

Defendant.

CLERK'S CERTIFICATE TO RECORD ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing one hundred twenty-two (122) pages, numbered from 1 to 122, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing record to writ of error is $73.20; that said amount was paid by American National Bank, a corporation, defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto

set my hand and affixed the seal of said District Court this 22d day of March, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. **[123]**

[Ten Cent Internal Revenue Stamp. Canceled March 22/16. J. A. S.]

[Writ of Error.]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between American National Bank, a Corporation, plaintiff in error, and Bank of Bandon, a Corporation, defendant in error, a manifest error hath happened, to the great damage of the said American National Bank, a Corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit

Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 17th day of February, in the year of our Lord one thousand nine hundred and sixteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
District Judge. **[124]**

Receipt of a copy of the within Writ of Error is hereby admitted this 17th day of February, 1916.

MASTICK & PARTRIDGE,
Attorneys for Defendant in Error.

[Endorsed]: No. 15,831. United States District Court for the Northern District of California, Second Division. American National Bank, a Corporation, Plaintiff in Error, vs. Bank of Bandon, a Corporation, defendant in Error. Writ of Error. Filed

Feb. 18, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Citation on Writ of Error.]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Bank of Bandon, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern Dis-

trict of California, Second Division, wherein American National Bank, a *Corporation,* plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 17th day of February, A. D. 1916.

WM. C. VAN FLEET,
United States District Judge. **[125]**

Receipt of a copy of the within Citation is hereby admitted this 17th day of February, 1916.

MASTICK & PARTRIDGE,
Attorneys for Defendant in Error.

[Endorsed]: No. 15,831. United States District Court for the Northern District of California, Second Division. American National Bank, a Corporation, Plaintiff in Error, vs. Bank of Bandon, a Corporation, Defendant in Error. Citation on Writ of Error. Filed Feb. 18, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2765. United States Circuit Court of Appeals for the Ninth Circuit. American National Bank, a Corporation, Plaintiff in Error, vs. Bank of Bandon, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error

to the United States District Court of the Northern District of California, Second Division.

Filed March 23, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

AMERICAN NATIONAL BANK, a Corporation,
Plaintiff in Error,

vs.

BANK OF BANDON, a Corporation,
Defendant in Error.

Order Enlarging Time to File Record on Writ of Error and Docket the Cause.

Good cause appearing therefor, it is Ordered that the plaintiff in error may have to and including the 30th day of March, 1916, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 17, 1916.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 2765. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to —— File Record Thereof and to Docket Case. Filed Mar. 17, 1916. F. D. Monckton, Clerk. Refiled Mar. 23, 1916. F. D. Monckton, Clerk.